STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ENBRIDGE ENERGY, LIMITED PARTNERSHIP; ENBRIDGE ENERGY COMPANY, INC.; AND ENBRIDGE ENERGY PARTNERS, L.P.,

Plaintiffs,

v

STATE OF MICHIGAN, GOVERNOR OF MICHIGAN; MACKINAC STRAITS CORRIDOR AUTHORITY; MICHIGAN DEPARTMENT OF NATURAL RESOURCES; AND MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY,

Defendants.

No. 19-000090-MZ

HON. MICHAEL J. KELLY

08/15/2019 STATE DEFENDANTS' REPLY BRIEF TO 08/01/2019 PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' 06/27/2019 MOTION FOR SUMMARY DISPOSITION AND IN SUPPORT OF JUDGMENT IN PLAINTIFFS' FAVOR UNDER MCR 2.116(I)(2)

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INTRODUCTION

As demonstrated in State Defendants' initial Brief: (1) 2008 PA 359 (Act 359) violates the Title-Object Clause of Michigan's Constitution because several of its provisions exceed the scope of what is generally reflected in its title; (2) Act 359 also violates the Title-Object Clause because it embraces multiple objects; (3) Act 359 and all State actions based upon it, including the December 19, 2018 Tunnel Agreement, are void from their inception; and (4) the December 19, 2018 Third Agreement between the Snyder Administration and Enbridge, which is inextricably tied to the Tunnel Agreement, is likewise invalid and unenforceable.

Enbridge's response does not effectively rebut those conclusions. Instead, as outlined below, it repeatedly mischaracterizes the State Defendants' arguments and erects "straw person" positions that State Defendants have not and do not advance. In addition to presenting a self-serving but legally irrelevant version of the factual background of this case,[1] Enbridge's response erroneously suggests that the issues before this Court include the content of the March 28, 2019 opinion of the Attorney General[2] rather than the validity of Act 359 itself.

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[1] See Pl Br, pp 3–6. While the risks of the continued operation of the existing Enbridge Dual Pipelines at the Straits of Mackinac are not relevant to the legal issues before this Court involving the validity of Act 359, Enbridge's characterization of those risks is disputed and is the subject of a separate pending legal action brought by the Attorney General against Enbridge. *Dana Nessel v Enbridge Energy Limited Partnership, et al.* (Ingham Circuit Court No. 19-474-CE.)

[2] See Pl Br, pp 12–13. State Defendants have not and do not argue that any court is bound by the conclusions reached in the opinion of the Attorney General. Enbridge's implication that those conclusions were driven by her "personal views and ideas" rather than legal analysis is unfounded and offensive. It ignores the fact that the opinion was issued pursuant to the attorney general's duty under MCL 14.32 to provide her opinion on questions of law submitted by certain public officials, in this instance, specific questions raised by Governor Whitmer, and consistent with the long established procedures of the Department of Attorney General involving multiple

Notably, Enbridge's legal arguments improperly attempt to re-write the title of Act 359, inventing a new, broader object—providing for "infrastructure" connecting the peninsulas—which collapses the clear distinction drawn by the Legislature between the Mackinac "bridge" and the proposed "utility tunnel." Moreover, Enbridge makes the legally unsupported claim that this Court should look beyond the text of the Act itself and rely upon "debates in legislative and public forums" in late 2018 as evidence that there was sufficient "fair notice" of the content of Act 359 to satisfy the requirements of the Constitution. For these reasons and the reasons more fully stated below and in State Defendants' initial brief, this Court should grant their motion for summary disposition and deny Enbridge's request for summary judgment under MCR 2.116(I)(2).

ARGUMENT

I. Act 359 violates the Title-Object Clause because its title does not provide fair notice of key provisions of its body.

A. Act 359 amended the title of Act 214 to include the following new objects: authorizing (1) the Bridge Authority to acquire a utility tunnel; (2) the creation of the Corridor Authority; and (3) the operation of a utility tunnel by the Bridge Authority or the Corridor Authority.

Contrary to Enbridge's assertions, State Defendants neither insist that the title of Act 359 "must contain the implementation details" (Pl Br, p 15) nor argue that the title must match exactly or detail every element of the body. (Pl Br, p 17.) Instead, as clearly stated in their initial brief:

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stages of internal drafting and review, including the Opinion Review Board comprised of senior and career assistant attorneys general. See https://www.michigan.gov/ag/0,4534,7-359-81903_20988---,00.html. In any event, it is undisputed that the constitutionality of any statute is subject to de novo review by the courts.

> While a title need not serve as an index to all the provisions of an act, *Rohan*, 314 Mich at 355; *Twp of Ray*, 226 Mich App at 728–729, it must "'*comprehensively* declare[ ], though in general terms'" the "'main general object or purpose'" of the act. *Pohutski*, 465 Mich at 691 (citations omitted) (emphasis added). The title need not directly mention other provisions in the body of the act if those provisions "'are germane, auxiliary, or incidental to [the] general purpose[.]'" *Id.* [Def Br, p 19.]

Equally without merit is Enbridge's claim that State Defendants' analysis of the relationship between the title and body of Act 359 contains "critical flaws" (Pl Br, pp 16–17). To begin, the case cited by Enbridge, *H. J. Tucker & Associates v Allied Chucker and Engineering Co,* 234 Mich App 550, 557–558 (1999), neither held nor implied that the determination of the statute's object must be "based on the title *alone*," with no corresponding determination of the object actually contained in the statute's body. (Pl Br, p 17.) And State Defendants' analysis—which begins by examining the object(s) stated in the title of the Act and then compares them to the body of the Act to determine whether the provisions in the body are disclosed in the title, or if not, whether the provisions are germane to the stated object(s) (see Def Br, pp 19–29)—does not conflict with the "rough and ready" approach to title-body analysis advocated by the author of the state bar journal article selectively quoted by Enbridge (Pl Br, p 17, n 31).[3] Indeed, it is logically and legally impossible to determine whether a statute complies with the Title-Object Clause without comparing the title and the body.

The statute at issue here, Act 359, amended both the title and body of Act 214, which for more than 60 years pertained solely to the acquisition and operation of a motor vehicle bridge at the Straits of Mackinac by the Mackinac Bridge Authority. As explained in State Defendants' initial brief (pp 18–19), Act 359 made three specific amendments to the title of Act 214, "authorizing the Mackinac bridge authority to acquire a bridge *and a utility tunnel . . . the*

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[3] Manson, Carl H. (1934) "The Drafting of Statute Titles," *Indiana Law Journal*: Vol. 10: Issue 3, Article 2. Available at: https://www.repository.law.indiana.edu/ilj/vol10/iss3/2

creation of the Mackinac Straits corridor authority . . . [and] *the operation of a utility tunnel by the* [Bridge] *authority or the Mackinac Straits corridor authority.*" [New language in italics.] These are the objects clearly expressed in the title by the Legislature.

To bolster its defense of the constitutionality of Act 359, Enbridge undertakes to effectively re-write its title. Moving beyond the plain and unambiguous language chosen by the Legislature, Enbridge invents its own statement of the purpose of the Act: "creating *infrastructure* connecting the Upper and Lower Peninsulas of Michigan." (Pl Br, pp 17–18, emphasis added.) In doing so, Enbridge improperly disregards the obvious textual distinctions drawn by the Legislature between a "bridge" and "a utility tunnel," between "acquire" and "operat[e]," and between the "Mackinac bridge authority" and the "Mackinac Straits corridor authority." And it substitutes a term- "infrastructure"—not used by the Legislature in the title.[4] Where, as here, the text of the statute is plain and unambiguous, neither litigants or a reviewing court may re-write or construe it as they see fit. *Hesse v Ashland Oil, Inc.*, 466 Mich 21, 30–31 (2002) (internal citations omitted).

B. The specific provisions of Sections 14d and 14a of Act 359 identified by State Defendants are not disclosed in the title nor germane, auxiliary, or incidental to its stated purpose.

As explained in State Defendants' initial brief, subsections 14d(1), 14d(4), 14d(5), 14a(1), and 14a(4) all fail title-body review. (Def Br, pp 20–29.) Enbridge's arguments to the contrary are without merit.

[4] The word "infrastructure" is used in Act 359, but only as part of the phrase "utility infrastructure" contained in the definition of "utility tunnel" in Section 14(e). The Legislature could have, but chose not to, employ that term in the title. This further undermines Enbridge's claim that the Legislature's purpose in enacting Act 359 was to lump together "bridge" and "utility tunnel" under the category of "infrastructure."

First, the title of Act 359 does not provide fair notice that under subsection 14d(1), all functions of the Bridge Authority relating to the utility tunnel, including acquiring a tunnel, are immediately transferred to the new Straits Corridor Authority as soon as its members are appointed. This *directly conflicts with* the first clause of the title which authorizes the Bridge Authority alone to acquire such a tunnel and discloses no such provision for the Corridor Authority.

Enbridge's reliance here on *Midland Twp v State Boundary Comm'n,* 401 Mich 641, 654 (1977) for the proposition that "[w]hether a provision is germane depends on its relationship to the object of the act, not who is charged with implementing the provision" (Pl Br, p 18) is misplaced. In *Midland Twp,* the issue was whether an amendment to the home rule cities act providing annexation procedures for cities by the State Boundary Commission was germane to the purposes of that act. Because that act's title had been held to have as its object anything germane to the functioning of a city, the court held that the amendment did not violate the Title-Object Clause. *Id.* at 654. Here, the issue is not the failure of a broadly worded title to specify the identity of the entity implementing a statutory provision, but rather the fact that the body of Act 359 directly contradicts what its title specifically provides for. The other case cited by Enbridge, *Commuter Tax Ass'n v Detroit,* 109 Mich App 667, 672 (1981) is similarly inapposite. There, the court held that several provisions in a 1981 amendment to the City Income Tax Act, including certifications by the state administrative board, were germane to the broadly stated purpose of the act to "provide the procedure" for imposing and collecting a city income tax, and that the statute was not defective because the title of the act did not refer to the administrative board. Again, the issue here is not a broad title's failure to specify the identity of an implementing agency, but rather the conflict between what the title of Act 359 specifies for implementation and what its body actually provides.

Moreover, contrary to Enbridge's suggestion, the challenge here to Section 14d(1) is not based upon a "technical" or "strained" construction of Act 359's title. (Pl Br, p 19.) On the contrary, it is based upon the plain and unambiguous language of the title regarding the acquisition of a utility tunnel and the conflict between that language and what is provided for in the body.

Second, the title of Act 359 does not provide fair notice that, pursuant to Section 14d(4), the newly created Mackinac Straits Corridor Authority was *required, within days* of the enactment and its creation, to enter into a *very specific utility tunnel agreement* with a private party (Enbridge) under which that *private party, rather than the Authority, will both construct and operate* the proposed tunnel. (Def Br, pp 22–24.) None of this was disclosed in the title of Act 359.

Enbridge's contention that these provisions are all "germane or incidental" to two of the purposes expressed in Act 359—authorizing the creation of the Corridor Authority and the operation of a utility tunnel by the Corridor Authority (Pl Br, pp 19-20)—is without merit. To begin, these provisions actually conflict with the purposes stated in the title. As noted above, the title indicates that the Bridge Authority, not the Corridor Authority, will acquire the proposed utility tunnel. But the body contradicts this by mandating that the *Corridor Authority* enter into an agreement or agreements proposed by former Governor Snyder to have a private party construct the tunnel for it. Thus, Enbridge's suggestion that "the acquisition of the tunnel by the [Corridor] Authority are[sic] plainly contemplated by the Act's title . . ." (Pl Br, p 19) is incorrect. Moreover, while the title expresses the purpose of authorizing the "operation of a utility tunnel by . . . the Mackinac Straits Corridor authority," the body of the act in subsection 14d(4) contradicts this by mandating a tunnel agreement under which a private party, not the Authority, would operate the utility tunnel. The highly prescriptive requirements of Subsection

14d(4) regarding the timing and content of the agreement are not, as Enbridge asserts, germane or incidental to the title's stated purpose of authorizing "*the creation of* the Mackinac Straits corridor authority." (Emphasis added.) A different provision of Act 359 that actually provides for the creation of the Corridor Authority, Section 14b, not Section 14d, relates to and effectuates that purpose. Nothing about that purpose, or any other part of Act 359's title, signals that the Corridor Authority, once created, would be required to enter into a very specific agreement for a private party, and not the Corridor Authority or Bridge Authority, to construct, operate, and fund the tunnel.

Third, the title of Act 359 does not provide fair notice that under Section 14d(5), if the attorney general declines to represent the Bridge Authority or Corridor Authority in "a matter related to the utility tunnel," the attorney general shall provide for the costs of representation by an attorney chosen by the respective authority. Since nothing even remotely like this appears in the title, Enbridge appears to suggest that this provision is somehow germane or incidental to the express purposes of Act 359, offering only the following conclusory assertion: ". . . the responsibility of representation is intimately connected to the creation of the Authority and the utility's tunnel [sic], and serves to protect and maintain the utility tunnel's viability." (Pl Br, p 20.) But contrary to Enbridge's claim, this provision has no discernable connection, intimate or otherwise, to the creation of the Authority. Nor is it necessarily related to the operation of a utility tunnel. If this highly unusual intrusion into the attorney general's authority to provide legal services to state agencies is deemed "germane" to the express purposes of the Act, it is difficult to imagine anything that would not be under Enbridge's expansive theory. Implicitly

recognizing the weakness of its argument, Enbridge suggests that Section 14d(5) could readily be severed from the remainder of Act 359.[5]

Finally, the title of Act 359 does not provide fair notice that under Sections 14a(1) and 14a(4) the Mackinac Bridge Authority[6] may, respectively, enter into contracts and agreements, including leases, relating to a utility tunnel and secure the consent of any government agency to the construction and operation of a utility tunnel. This is because the title of Act 359 specifically refers to the limited purpose of authorizing the Bridge Authority to take these same actions with respect to a bridge but omits any parallel authorities with respect to a utility tunnel (see Def Br, pp 26–29). Enbridge's response tries to brush this aside, asserting that all of the provisions are germane to the stated purposes of "acquisition" and "operation" of a utility tunnel. (Pl Br, pp 21–22.) But that argument ignores the limitations the Legislature placed on the specific activities in question in the title and would render them nugatory, contrary to well-established principles of statutory construction. *Johnson v Recca,* 492 Mich 169, 177 (2012). *In re Seifert v Buhl Optical Co,* 276 Mich 694, 697 (1936), cited by Enbridge here, is inapposite. There, the court held that a provision in a statute forbidding certain types of advertising did not exceed the scope of the title of an act providing for the regulation of optometry despite the fact that there was no mention of it in the title. Here, by contrast, the title of Act 359 singles out certain specific activities that it intended to authorize but limited their application to a bridge rather than a tunnel.

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[5] Notably, Enbridge's response does not dispute or rebut State Defendants' argument (Def Br, pp 29–32) that the other challenged provisions of Act 359 – Sections 14d(1), 14d(4), 14a(1), and 14a(4) – could not be severed if found unconstitutional, rendering the Act as a whole invalid.

[6] As noted above, Section 14d(1) provides for the automatic transfer of these powers from the Bridge Authority to the Corridor Authority upon appointment of the Corridor Authority's board members.

Enbridge's attempts to distinguish *Maki v East Tawas,* 385 Mich 151 (1971) and *Rohan v Detroit Racing Ass'n,* 314 Mich 326 (1946) from the present case (Pl Br, p 22) are unavailing. It is true that *Maki* dealt with a limited title and a provision in the body that exceeded the scope of the matters covered by the title. But it is not true that Act 359's title is "broad," and the challenged provisions are consistent with it. On the contrary, the title of Act 359 extensively details various specific purposes. The constitutional problem is that certain key provisions of the body of the act exceed the scope of what is fairly noticed in the title, and in some cases directly conflict with the language of the title. The purported "breadth" of the title is the product of Enbridge's improper attempt to re-write it.

Like the present case, *Rohan* involved a provision in the body of the statute that exceeded the scope of what was noticed in the title. 314 Mich at 354. Enbridge's claim that the challenged provisions in the body of Act 359 "are in furtherance of the act's purpose" is again founded not on the actual text of the title, but rather on Enbridge's self-serving gloss on that text.

C. There is no legal basis to look beyond the text of Act 359 to determine if its title provided fair notice of the content of its body.

Enbridge wrongly suggests that "Defendants lose sight of the basic goals of the title body clause . . . . 'notice, not restriction of legislation.' *In re Requests of the Governor*, 389 Mich at 467." (Pl Br, p 16.) In both their initial brief (see, e.g. Def Br, pp 15–16, 20, 22, and 24) and this reply brief, State Defendants acknowledge that a central goal of the Title-Object Clause is to ensure that both legislators and the public have proper notice of the content of legislation and that the title-body analysis focuses on whether the title provides "fair notice" of the legislative content.

Remarkably, Enbridge then suggests that this Court can and should reject State Defendants' title-body challenges on the ground that "fair notice was provided as to Act 359's contents given the debates in the legislative and public forums at the time." (Pl Br, pp 22–24.) Such an approach—determining whether a statute complies with the Title-Object Clause requirements of the Constitution based upon extrinsic evidence rather than the statutory text—has no basis in Michigan law. In each case cited by Enbridge, the court based its decision solely upon review of the statute itself. While Enbridge quotes language from *Advisory Opinion re Constitutionality of 1972 PA 294,* 389 Mich 441, 465 (1973), in which the court observed that "the Legislature and public were well aware of the intention and context of the legislation" and noted that subject [so-called "no-fault" automobile insurance] had received extraordinary public attention, a careful reading of the advisory opinion[7] does not support Enbridge's suggestion that the court actually based its conclusion that the statute was constitutional on extrinsic evidence rather than the text of the statute.

Enbridge's suggestion that the existence and public availability of proposed legislation and agency bill analyses through the Michigan Legislature website and media reports somehow satisfy the requirements of the Michigan Constitution governing the enactment of statutes is legally unsupported and should be flatly rejected by this Court.

II. Act 359 also violates the Title-Object Clause because it includes multiple objects.

As demonstrated in State Defendants' initial brief, Act 359 also runs afoul of the Title-Object Clause's mandate that "[n]o law shall embrace more than one object," and is

[7] And, as the court itself noted, the Advisory Opinion did not constitute a decision of the court and was not precedentially binding. 389 Mich at 460, n 1.

unconstitutional in its entirety. (Def Br, pp 32–40.)[8] After reviewing the legal standards that apply to a multiple-object challenge (Def Br, pp 33-34)—the same standards cited by Enbridge (Pl Br, pp 24-27)—Defendants' initial brief explained that Act 359 violates the multiple-object prohibition in two ways. First, it amended Act 214 (whose sole object has long been the acquisition and operation of a motor vehicle bridge by the Mackinac Bridge Authority) by adding to it a second, unrelated principal object—the construction and operation of a privately funded utility tunnel and with it, the creation of a separate, unrelated entity, the Corridor Authority. (Def Br, pp 34–38.) Second, Act 359 defines "bridge" in such a way that it contains multiple objects within itself. (Def Br, pp 38–40.)

Enbridge's response fails to effectively rebut these arguments. Once again, Enbridge principally relies upon its own invention of a purported single object of Act 359—providing for "infrastructure" connecting the Upper and Lower Peninsulas. (Pl Br, pp 25, 27, 29–30,32.) But this after-the-fact rationalization of Act 359 is not supported by the history, structure, and text of the statutes in question: Acts 214 and 359. For more than 60 years, Act 214 expressed and contained a single, principal object—the construction and operation of a vehicular bridge by the Mackinac Bridge Authority, to be funded and used by the public. Act 359 amended Act 214 to graft onto it a distinct new object—the creation of a new, separate, and unrelated entity, the Corridor Authority, to facilitate the privately funded construction and operation of a utility tunnel to house Enbridge's oil pipeline. Contrary to Enbridge's assertions, the distinction between the "bridge" and the "utility tunnel" is not a "hyper-technical" argument by Defendants inconsistent

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[8] Enbridge's disparaging comment that the Attorney General "did not see fit to even raise [this issue]" in the March 2019 opinion (Pl Br, p 24) is unfounded. The opinion itself explained at p 21 that because Act 359 was unconstitutional under title-body review, it was unnecessary to address the additional questions raised by Governor Whitmer. Once Enbridge filed this lawsuit seeking a categorical declaration that Act 359 is constitutional, it became necessary for Defendants to address this issue.

with liberal construction of the Title-Object Clause. (Pl Br, p 28.) Rather, it is a function of the decisions made and language chosen by the Legislature itself in enacting Acts 214 and 359, and the obvious fact that there is no necessary or inherent connection between a decades-old vehicle bridge for the public and a new, privately funded underground utility tunnel proposed to be located and operated several miles away and to be used primarily by Enbridge to transport oil.

III. Act 359 and all State actions based upon it, including the Tunnel Agreement, are void from their inception.

State Defendants' initial brief explained why, if Act 359 is unconstitutional, the Act itself and all the State actions premised upon it, including the Tunnel Agreement, are void from their inception and without legal effect. (Def Br, pp 40–44.) While Enbridge's response argues that Act 359 is constitutional, it does not dispute the Defendants' analysis of the consequence of a ruling by the Court that it is not.

IV. The Third Agreement, which is inextricably tied to the Tunnel Agreement, is also unenforceable.

As State Defendants' initial brief demonstrated, the Third Agreement is expressly dependent on the effectiveness of the Tunnel Agreement, so that if Act 359 and the Tunnel Agreement fail, so must the Third Agreement. (Def Br, pp 44–46.) Once again, while Enbridge argues that Act 359 is constitutional, it does not dispute Defendants' analysis of the effect of a contrary ruling on the validity of both the Tunnel Agreement and Third Agreement.[9]

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[9] State Defendants' initial brief identified an additional reason, independent of the unconstitutionality of Act 359, why portions of the Third Agreement are invalid based upon the reserved powers and public trust doctrines. Enbridge offers a confusing and unpersuasive response to that argument. (Pl Br, pp 33–38.) Since the constitutional issue is dispositive in itself and Enbridge's own request for summary disposition is limited to a determination of whether Act 359 violates the Title-Object Clause and whether the 2018 Agreements, including the Third Agreement, are "invalid due to any constitutional defect in act 359" (Pl Br, p 38), this Court need not address this additional argument or Enbridge's attempted response.

CONCLUSION

For the foregoing reasons and the reasons more fully stated in State Defendants' initial brief, Defendants respectfully request that this Court:

A. Grant State Defendants' motion for summary disposition;

B. Deny Enbridge's request for summary judgment under MCR 2.116(I)(2); and

C. Grant State Defendants such other relief as the court finds appropriate and just.

Respectfully submitted,

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