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October 31, 2018

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319, 27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Upper Canada Transmission, Inc., operating as NextBridge Infrastructure LP and Hydro One Networks Inc.  
East-West Tie Line Project and Lake Superior Link Project Combined Hearing  
Board File Nos. EB-2017-0182 / EB-2017-0194 / EB-2017-0364**

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-mentioned proceeding. Please find enclosed the Final Argument of Anwaatin, submitted pursuant to Procedural Order No. 1.

Yours very truly,

A handwritten signature in black ink, consisting of a stylized, cursive 'L' followed by a long horizontal stroke that ends in an arrowhead pointing to the right.

Lisa (Elisabeth) DeMarco

**ONTARIO ENERGY BOARD**

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

**AND IN THE MATTER OF** an application by Upper  
Canada Transmission Inc., operating as NextBridge  
Infrastructure LP, for leave to construct an electricity  
transmission line between Thunder Bay and Wawa,  
Ontario;

**AND IN THE MATTER OF** an application by Hydro One  
Networks Inc. to upgrade existing transmission facilities in  
the districts of Thunder Bay and Algoma, Ontario;

**AND IN THE MATTER OF** an application by Hydro One  
Networks Inc. for leave to construct an electricity  
transmission line between Thunder Bay and Wawa,  
Ontario.

**EB-2017-0182**  
**EB-2017-0194**  
**EB-2017-0364**

**FINAL ARGUMENT**

**ANWAATIN INC.**

**October 31, 2018**

## INTRODUCTION AND OVERVIEW

1. We are counsel to Anwaatin Inc. (**Anwaatin**) in the following matters before the Ontario Energy Board:
  - (a) EB-2017-0182, the application of Upper Canada Transmission Inc., operating as NextBridge Infrastructure LP (**NextBridge**), for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario (the **NextBridge Application**);
  - (b) EB-2017-0364, and the application of Hydro One Networks Inc. for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario (the **Hydro One Application**); and
  - (c) EB-2017-0194 the application of Hydro One to upgrade existing transmission facilities in the districts of Thunder Bay and Algoma, Ontario (the **Stations Application**);each pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B), as amended (the **Act**) (collectively, the **LTC Applications**). The electricity transmission line between Thunder Bay and Wawa, Ontario, for which both NextBridge and Hydro One seek leave to construct, is referred to herein as the East-West Tie Line (**EWT Line**), irrespective of the applicant.
2. Anwaatin is a collective of Indigenous communities that are focused on achieving reliable, affordable, and sustainable energy for their communities. Anwaatin's members in this proceeding include: Animbiigoo Zaagi'igan Anishinaabek (**AZA**) and Bingwi Neyaashi Anishinaabek (**BNA**). AZA and BNA may be collectively referred to herein as the **Anwaatin Communities**.
3. The traditional territory of AZA and BNA includes the Lake Nipigon watershed and areas that will be impacted by the EWT Line. AZA and BNA are also among the Indigenous communities that the Ministry of Energy has determined to require consultation, given that

they have or may have constitutionally protected Aboriginal or treaty rights that may be adversely affected by the EWT Tie Line.<sup>1</sup>

4. AZA has recently negotiated reserve lands and is in the process of planning a new reserve community near Beardmore, Ontario. BNA is formerly known as the Sand Point First Nation and is located on the south-east shore of Lake Nipigon, with traditional territory that also includes the Lake Nipigon watershed and areas that will be impacted by the EWT Line. Both First Nations are members of Waaskiinaysay Ziibi Inc. (**WZI**), an economic development corporation made up of five Lake Nipigon First Nations. Other WZI members that form part of Bamkushwada Limited Partnership (**BLP**) have intervened separately in the LTC Applications.
5. Anwaatin respectfully requests that the Board condition its decision and approvals on the LTC Applications in order to:
  - (a) impose timing and construction milestones to minimize the potential for delay and related reliability impacts in assessing the relative merits of the LTC Applications;
  - (b) ensure that the duty to consult is properly and fully discharged;
  - (c) require significant Indigenous training, procurement, and employment as part of the construction of the EWT Line; and
  - (d) ensure that no further and unnecessary delay is incurred in relation to the long-awaited EWT Line.
6. Anwaatin's submissions are organized as follows:
  - I. **Reliability: reliability concerns necessitate selecting the most expedient LTC Application**
  - II. **Indigenous Procurement and Employment: Indigenous procurement and employment opportunities are essential and should form a condition of the Board's decision**
  - III. **Duty to Consult: the Board must ensure that the duty to consult and potentially accommodate adversely affected Indigenous communities has been fully addressed and discharged**
  - IV. **Requested relief**

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<sup>1</sup> See EB-2017-0364, Hydro One Networks Inc., LSL Motion Additional Evidence, Attachment 9, page 2 of 3.

## DETAILED SUBMISSIONS

- I. **Reliability: *reliability concerns necessitate selecting the most expedient LTC Application***
  - (a) Reliability impacts and the need for completion of the EWT Line without further delay
7. Anwaatin generally supports the prompt construction and expansion of the EWT Line without further delay. The Independent Electricity System Operator (**IESO**) has confirmed that the EWT Line is needed before December 2020, and failure to have it operating before the end of 2022 will have significant and costly impacts that should be avoided.<sup>2</sup> The prompt construction of the EWT Line will also assist in alleviating severe electricity reliability concerns in northern Ontario and disproportionate impacts on the Anwaatin Communities and other Indigenous communities in the region.<sup>3</sup>
8. The Anwaatin Communities are of the strong view that, in order to facilitate and ensure improved reliability, the Board should select the applicant that can construct the EWT Line and have it in service as quickly as possible, without delay, and prior to 2022. Further, regardless of which applicant is granted leave to construct the EWT Line, the Board should impose timing-related milestones and conditions in order to ensure that the EWT Line is promptly completed. Similarly, the Anwaatin Communities support prompt approval of the Stations Application and conditions that will allow construction to commence pending the recently delayed environmental assessment.
9. Section 96 of the Act requires the Board to consider "the interests of consumers with respect to prices and the reliability and quality of electricity service", in considering whether the LTC Applications are in the public interest.<sup>4</sup> The Board's reliability and quality of electricity service mandate provides a strong impetus for the Board to select the LTC Application with the earliest possible in-service date for the EWT Line. This is supported by both the IESO and the ministerial declaration regarding the EWT Line.

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<sup>2</sup> Independent Electricity System Operator, "Addendum to the 2017 Updated Assessment for the Need for the East-West Tie Expansion: Reliability Impacts and the Projected System Costs of a Delay to the Project In-service Date", June 29, 2018 at 1 [**IESO Addendum**].

<sup>3</sup> See discussion in Part I (b), below. See also e.g., Exhibit K 3.3.

<sup>4</sup> *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B, s 96 [emphasis added].

10. On March 4, 2016, the Minister declared that the EWT Line is needed as a priority project in accordance with section 96.1 of the Act, pursuant to Order in Council 326/2016.<sup>5</sup> The Order in Council also specifically notes that an in-service date of 2020 for the EWT Line is a priority.
11. The IESO continues to recommend an in-service date of 2020 for the EWT Line and expressly concluded that "[i]f the in-service date is delayed beyond 2020, using interim measures to manage the need will result in additional costs and increased risks to system reliability."<sup>6</sup> The IESO specifically found that the potential reliability impacts and costs of a delay to the necessary 2020 in-service date result from each and all of: (i) incremental capacity needs in northwestern Ontario and the costs of acquiring that capacity until the EWT Line is in service; (ii) increased energy costs incurred until new EWT Line is in service; and (iii) increased transmission losses and associated costs incurred until new EWT Line is in service.<sup>7</sup>
12. The IESO estimates that the total annual cost of delay in 2017 dollars could reach \$19 million in 2021, \$23 million in 2022, \$39 million in 2023, and \$45 million in 2024.<sup>8</sup> Further, the IESO notes that the "costs associated with implementing alternative measures to address a delay beyond the end of 2022 are highly uncertain as new resources, generation, and/or capital investment in retired facilities would likely be required in addition to any interim measures taken during the 2020 to 2022 period."<sup>9</sup> Moreover, Mr. Farmer confirmed that a number of assumptions in the IESO's reliability cost modelling are no longer accurate and could have the effect of increasing the potential costs of delaying the in-service date of the EWT Line:

MS. DeMARCO: [...]

Fair to say that when you put in your inputs, you included the Thunder Bay generating station?

MR. FARMER: In our original runs, we did indeed. And in the assessment that is within this document, we have the Thunder Bay generating station as a resource.

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<sup>5</sup> EB-2017-0182, NextBridge Infrastructure LP Evidence, Exhibit B, Tab 4, Schedule 1, Attachment 1, page 2 of 2.

<sup>6</sup> IESO Addendum at 1.

<sup>7</sup> IESO Addendum at 1.

<sup>8</sup> IESO Addendum at 5.

<sup>9</sup> IESO Addendum at 6.

And we anticipated that the Thunder Bay generating station would have been available to us in some form to be re-procured in some way when its expiry date was at 2020, should that have been needed. The Thunder Bay generating station developed some issues earlier this year, and OPG came to us -- Ontario Power Generation came to us and asked if, given the magnitude of investment they would have to make in the station to maintain its running and with only one year left on their contract -- which was a pilot project to burn advanced biomass -- would we consider cancelling the contract.

We, in our experience, had not been seeing a measurable contribution from the Thunder Bay generating station towards reliability. It had a very high forced outage rate. And so we accepted that proposal, knowing that Thunder Bay was not making a significant difference in our assessments at that time, and cancelled the contract.

My understanding is that Ontario Power Generation are decommissioning the facility.

MS. DeMARCO: So very generally, when you ran the June 29th model, there was a resource that was in the model and on July 27th, that resource is no longer available?

MR. FARMER: That is correct. I would stress, though, that in the years that we have highlighted in our analysis here, the Thunder Bay generating station was not included in any of those years because the Thunder Bay generating station's contract would have ended by 2020.

MS. DeMARCO: So in the 2017, 2018, and 2019 assumptions it was included. But after 2020...

MR. FARMER: That is correct.

MS. DeMARCO: 2020 itself was included, yes?

MR. FARMER: Thunder Bay would have -- I believe its contract would have ended at the beginning of 2020. And so it would have been perhaps partially included for 2020, but it really wasn't included for 2020.

MS. DeMARCO: Thank you, that's helpful, partially included for 2020.

[...]

MS. DeMARCO: If you've overestimated the potential supply available and underestimated forecast load, what is the directional possible impact on your conclusions regarding reliability impact and costs?

MR. FARMER: So if I followed that correctly, and without knowing the exact quantums, but it sounds as though the capacity requirement would be higher.

MS. DeMARCO: Okay. And in terms of therefore the cost of delay with fewer resources -- let's just focus on the resource piece -- if you have

fewer resources available than you thought you had and that were in your assumptions in the modelling and you have to go procure them, would those costs be higher, lower, or no change directionally in your mind?

**MR. FARMER: One would expect the costs to be higher. It is basically if the need is 100 megawatts, you assign a value to 100 megawatts. If the need is 101 megawatts, it is basically 101 percent of the value.**

MS. DeMARCO: Okay, great. Similarly, in relation to the impact on the costs of reliability or interim resource reliance, would you expect the -- if you have overestimated the supply and underestimated the associated demand, would the costs be higher, lower, or no change?

MR. FARMER: Can you repeat that one for me again?

MS. DeMARCO: Yes, I wasn't elegant in that, sorry.

In relation to the impact on the reliability-related costs, and specifically those interim resources that you speak to in the report, given the assumptions that there is supply in there that is too high at this point, you have resources that have come out of your assumptions, and that demand could be higher, would you expect those costs related to interim resources to be achieve reliability to be higher, lower, or no change?

MR. FARMER: You would expect them to be higher.

MS. DeMARCO: All right. Thank you.<sup>10</sup>

- (b) Disproportionate impacts of delay and poor reliability on Indigenous communities
13. AZA and BNA and northern Ontario generally experience much worse reliability than the rest of Ontario, and they are interested in being part of the reliability solution.<sup>11</sup> Members of AZA and BNA, together with Supercom Industries, have received jobs and training and are awaiting the start of work on the EWT Line. They are concerned about the impact of a delay in construction and its impacts on the affected Indigenous communities, BLP, and Supercom Industries.
  14. Supercom Industries is a 100% First Nation-owned business formed in early 2016 by proximate First Nations, in response to the EWT Line project, with the purpose of enabling, ensuring, and maximizing the economic benefits arising from the construction of

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<sup>10</sup> Transcript, Volume 4 (October 9, 2018), 127:3-128:16 and 130:17-131:23 (emphasis added).

<sup>11</sup> See e.g., Exhibit K 3.3.

the project through procurement of materials, services, and labour. Supercom's purpose is to balance regional prosperity, a responsible approach to the environment, and successful project delivery. The partnership between the First Nations in relation to the EWT Line is an unprecedented regional cooperation initiative within this region and will be essential to ensuring Ontario meets its commitments to Indigenous communities.

15. Anwaatin submits that a delay in the in-service date of the EWT Line is likely to cause even greater costs and reliability issues in Indigenous communities, including AZA and BNA. Mr. Maria expressly confirmed that reliability is worse in northern Ontario and that the costs of reliability impacts on specific communities and delayed reliability improvements in specific communities did not form part of the IESO's analysis of the costs of a delay in the in-service date of the EWT Line:

MS. DeMARCO: My second area of questions relates to current reliability status in areas to be served by the line.

Fair to say -- I think this question is for you, Mr. Maria, but for both of you open -- when you look at reliability in Ontario, the reliability in the north is worse than the Ontario average?

MR. MARIA: I don't have the exact numbers. It would be -- maybe Hydro One or the LDCs would have that number. But I think it is fair to say that, like the lines in the northwest are long and so I would expect the reliability there to be worse than southern Ontario from the perspective of frequency and duration.

MS. DeMARCO: Great. And when you looked at in your report reliability impacts -- correct me if I'm wrong -- I understood that you looked at the system impacts and compliance with ORTAC, NERC, and the NPCC, is that right?

MR. MARIA: That's right.

MS. DeMARCO: And you didn't look at the reliability impacts on specific communities or specific Indigenous communities?

MR. MARIA: So this line wouldn't address reliability to very specific communities supplied by long radial lines. This line really addresses reliability to the whole region in the northwest.

MS. DeMARCO: Great. And you didn't look at those secondary costs associated with poor reliability in specific communities? That wasn't your mandate?

MR. MARIA: Yes. The East-West Tie, I wouldn't be able to address those.

MS. DeMARCO: And similarly, you didn't look at delayed reliability improvements in communities in the north as a function of the East-West Tie?

MR. MARIA: Sorry, I am not sure what you mean by "delayed". Can you repeat the question?

MS. DeMARCO: If there is an associated delay in the timing of the East-West Tie, you didn't look at the specific costs in specific communities of that delay?

MR. MARIA: So we didn't look at aspects such as if there is load interrupted what would be the costs to those communities, no, we didn't factor those costs in.<sup>12</sup>

16. Ms. Tidmarsh, on behalf of NextBridge<sup>13</sup>, and Ms. Goulais, on behalf of Hydro One<sup>14</sup>, variously confirmed several of the disproportionate and severe impacts of poor reliability that Indigenous communities involved in the construction of the EWT Line experience, including:

- loss of most refrigerated foods;
- loss of significant quantities of frozen meat, fish, and game birds, representing months of protected hunting and harvested food upon which First Nation families depend for their livelihoods;
- lost hunting and harvesting time as a result of the necessity of dealing with reliability impacts such as outages, and the need to find ways to replace lost meat, fish, and game birds with new protein sources through additional hunting and harvesting;
- loss of significant quantities of frozen blueberries used for sustenance as well as for cash sales to supplement family incomes; and
- loss of refrigerated insulin needed for diabetes treatment for many Indigenous people.

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<sup>12</sup> Transcript, Volume 4 (October 9, 2018), 131:24-133:7.

<sup>13</sup> Transcript, Volume 5 (October 10, 2018), 67:7-69:13.

<sup>14</sup> Transcript, Volume 3 (October 4, 2018), 140:11-141:24.

17. NextBridge expects that its project to build the EWT Line will be in-service by December 2020<sup>15</sup> and that it will increase the quality and reliability of electricity service for customers in northwest Ontario.<sup>16</sup> NextBridge notes in its argument-in-chief that its project to construct the EWT Line is "extensively studied, carefully planned, well defined and highly advanced" and "shovel-ready".<sup>17</sup>
18. The Anwaatin Communities recognize and accept NextBridge's evidence that: (i) a December 2020 in-service date avoids reliability risks and additional costly interim measures to manage the greater needs associated with a later in-service date<sup>18</sup> and (ii) consistent with the IESO findings, the NextBridge proposal meets the Board's minimum technical requirements for the EWT Line, has no single point of failure or bottleneck on the existing and new transmission corridor, requires no outages of the existing East-West Tie, and includes a cohesive failure containment and restoration strategy.<sup>19</sup>
19. Hydro One submits in its argument-in-chief that NextBridge's "insistence on a 2020 in-service date was artificial to begin with and is now unrealistic given that the line cannot be in service until at least 2021."<sup>20</sup> Anwaatin does not agree that a 2020 in-service date is "artificial" and "unrealistic", assuming that the most recent environmental assessment issues outline in paragraph 20 of these submissions can be resolved. Rather, Anwaatin views the needs for the EWT Line to be an urgent priority, in light of reliability concerns and urges the Board to make the in-service date and relevant milestones a condition of any leave to construct approval.
20. Correspondence from Mr. Robert Warren filed on behalf of Hydro One on October 29, 2018, cast additional doubt on the schedule for the EWT Line because of the Ministry of Environment, Conservation and Parks' decision to reject Hydro One's environmental assessment screening for the Wawa Transformer Station. Hydro One previously confirmed that, to bring the Marathon Transformer Station in-service by December 2021,

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<sup>15</sup> EB-2017-0182 / EB-2017-0194 / EB17-0364, NextBridge Argument-in-Chief, para 7.

<sup>16</sup> EB-2017-0182 / EB-2017-0194 / EB17-0364, NextBridge Argument-in-Chief, para 66.

<sup>17</sup> EB-2017-0182 / EB-2017-0194 / EB17-0364, NextBridge Argument-in-Chief, paras 3-4.

<sup>18</sup> EB-2017-0182 / EB-2017-0194 / EB17-0364, NextBridge Argument-in-Chief, para 7.

<sup>19</sup> EB-2017-0182 / EB-2017-0194 / EB17-0364, NextBridge Argument-in-Chief, para 7.

<sup>20</sup> EB-2017-0182 / EB-2017-0914 / EB-2017-0364, Hydro One Networks Inc. Argument-in-Chief, para 70.

the approval of all required environmental assessments by January 2019 is required.<sup>21</sup>  
This could result in further, unacceptable delays to the in-service date of the EWT Line.

**II. Indigenous Procurement and Employment: *Indigenous procurement and employment opportunities are essential and should form a condition of the Board's decision***

21. BLP's affiliate construction company, Supercom Industries, is involved in the construction aspects of the NextBridge Application and has entered into agreements with affected communities including BNA and AZA related to education, training, and the construction of the project.
22. The Anwaatin Communities have: (i) signed consultation agreements with an applicant; (ii) agreements in place with Supercom Industries and the outcome of the LTC Applications will affect their related economic development; (iii) considerable electricity reliability challenges and impacts; (iv) led the First Nations advocacy on transmission reliability and the disparate impacts of poor reliability on First Nations and traditional aboriginal rights on matters before the Ontario Energy Board; (v) an economic interest in the Namewaminikan Hydroelectric Project (commissioned in the spring of 2017) north of Beardmore, which may be served by the East-West Tie Line; and (vi) continued to participate jointly with other First Nations in the environmental assessment technical reviews of the EWT Line and the Stations Application.
23. NextBridge notes in its argument-in-chief that its general contractor, Valard, has worked closely with Supercom to promote local and Indigenous participation in the EWT Line project. Valard and Supercom have worked together to train over 250 individuals from 18 Indigenous communities. AZA and BNA confirm that many of these individuals from their communities are "ready to work" on the EWT Line.
24. Anwaatin submits that Indigenous procurement, jobs, and training are essential to the success of the EWT Line and present an opportunity for economic development and necessary infrastructure in the province's Indigenous communities.

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<sup>21</sup> EB-2017-0364, Hydro One Networks Inc. Interrogatory Responses, Exhibit I, Tab 5, Schedule 27, page 3 of 3.

25. The Anwaatin Communities therefore request that, if the Board grants leave to construct to Hydro One pursuant to the Hydro One Application, that it requires that all arrangements for Indigenous procurement and work opportunities be identical to or better than those proposed by NextBridge.

**III. Duty to Consult: *the Board must ensure that the duty to consult and potentially accommodate adversely affected Indigenous communities has been fully addressed and discharged***

26. Anwaatin's participation in the LTC Applications is, in part, grounded in the Anwaatin First Nations Communities' (i) constitutionally protected Aboriginal rights, title(s), and interests that may be adversely affected by the proposed EWT Line<sup>22</sup> and (ii) their right to be consulted about the project and potentially accommodated.<sup>23</sup> Anwaatin submits that the duty to meaningfully consult and potentially accommodate affected Indigenous communities is integral to the Board's consideration of the LTC Applications. Its importance is independent of, and not reduced by, the list of criteria for the Board's consideration under section 96(2) of the Act.

27. During the oral hearing, both Ms. Tidmarsh on behalf of NextBridge and Ms. Goulais on behalf of Hydro One confirmed<sup>24</sup> their understanding that the duty to consult includes each and all of the following general requirements of the duty to consult in the context of these LTC Applications:

- Make First Nations aware of the proposed process for consultation and listen to their responses on that process;
- Make First Nations aware of the proposed form that the consultation will take and listen to their views on that;
- Facilitate or assist with financial contributions or other capacity funding for participation;

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<sup>22</sup> *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1989 c 11 (UK), s 35 [*Constitution Act, 1982*].

<sup>23</sup> See *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas*].

<sup>24</sup> Transcript, Volume 5 (October 10, 2018), 57-66; Transcript, Volume 3 (October 4, 2018), 119-128.

- Enter into a two-way dialogue with each and all of the potentially adversely affected Indigenous communities;
  - Listen to and hear the concerns and consider measures to potentially address those concerns of the Indigenous communities or otherwise accommodate them;
  - Consider changing the project or the proposal in response to what the proponent has heard from the Indigenous communities; and
  - Explain to Indigenous rights-holders how the proponent believes their concerns have been addressed.
28. The Crown, and in certain contexts, the proponent, is required to do more than receive, document, and understand the concerns of Indigenous communities. It is also required to engaged in a "considered, meaningful two-way dialogue".<sup>25</sup> Indigenous communities are entitled to a dialogue that demonstrates that the Crown (i) not only heard, but also gave serious consideration to, the specific and real concerns that Indigenous communities put to the Crown, (ii) gave serious consideration to proposed accommodation measures, and (iii) explained how the concerns of the Indigenous communities impacted the Crown's decision to approve (or not approve) the project.<sup>26</sup> Further, the Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.<sup>27</sup> The duty to consult in these LTC Applications is clearly set out and delegated, in substantial part, by the Ministry of Energy to each of the applicants.
29. Anwaatin takes significant issue with Hydro One's characterization of "Indigenous issues" in its argument-in-chief and finds such characterization to be at odds with the prior accommodating positions and relationship-building that Hydro One has undertaken with Indigenous rights-holders in other proceedings. Specifically, Anwaatin does not agree with the submission that: (i) consideration of the competing merits of the NextBridge Application and the Hydro One Application has been "clouded" by considerations of

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<sup>25</sup> *Tsleil-Waututh*, para 558.

<sup>26</sup> *Tsleil-Waututh*, para 563.

<sup>27</sup> *Tsleil-Waututh*, para 564.

Indigenous consultation,<sup>28</sup> and (ii) such considerations are "outside the [Board]'s jurisdiction under section 92" of the Act, "as confirmed by the [Board] at page 3 of Procedural Order No. 4 and Procedural Order No. 6 of this proceeding."<sup>29</sup>

30. Anwaatin respectfully submits that none of sections 92 or 96 of the Act or Procedural Orders No. 4 or 6 support the proposition that Indigenous considerations are *ultra vires* the Board in these LTC Applications and further the letters from the Minister to proponents and regarding the duty to consult and potentially accommodate affected Indigenous communities appears to directly contradict such outdated propositions. The Procedural Orders, in fact, do not speak to Indigenous matters and only preclude issues of "need", specific "environmental concerns", "aesthetics", or "potential alternate transmission lines".<sup>30</sup>
31. Anwaatin respectfully submits that considerations of Indigenous consultation and ensuring that the Crown and proponents have fulfilled the constitutionally-enshrined duty to consult are central to the Board's consideration of the LTC Applications, well within its jurisdiction and form an effective special superseding public interest that must be considered in the LTC Applications.<sup>31</sup> Further, the approach to that public interest may very well be elucidatory to the Board in considering the relative merits of the competing applications.
32. Both the Board<sup>32</sup> and the Supreme Court of Canada (the **SCC**) have recently affirmed that decisions that trigger the duty to consult, like the LTC Applications, cannot and will not be upheld if the duty to consult has not been met.<sup>33</sup> Specifically, the SCC has held that the duty to consult is a constitutional imperative and gives rise to a special public interest that supersedes other concerns typically considered by tribunals required to act in the public interest.<sup>34</sup>

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<sup>28</sup> EB-2017-0182 / EB-2017-0914 / EB-2017-0364, Hydro One Networks Inc. Argument-in-Chief, para 7. See also para 80.

<sup>29</sup> EB-2017-0182 / EB-2017-0914 / EB-2017-0364, Hydro One Networks Inc. Argument-in-Chief, para 7.

<sup>30</sup> EB-2017-0182 / EB-2017-0914 / EB-2017-0364, Procedural Orders No. 4 at 3 and No. 6 at 3.

<sup>31</sup> *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B, ss 92 and 96(2).

<sup>32</sup> EB-2017-0319, Decision and Order of the Ontario Energy Board on Enbridge Gas Distribution Inc.'s Application for the Renewable Natural Gas Enabling Program (October 18, 2018) at 23-25.

<sup>33</sup> *Chippewas*, para 59; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].

<sup>34</sup> *Clyde River*, para 40.

33. Anwaatin respectfully submits that the Board must ensure that the duty to consult is met as the duty seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.<sup>35</sup> It has both a constitutional and a legal dimension.<sup>36</sup> Its constitutional dimension is grounded in the honour of the Crown.<sup>37</sup> This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights.<sup>38</sup> It is founded in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples and must be respected in this proceeding.<sup>39</sup>
34. The design and execution of the consultation process must also serve to facilitate a meaningful two-way dialogue on the concerns of Indigenous communities and provide an opportunity for the Crown, or its representatives, to make changes to proposed actions and policies based on information and insight obtained through consultation.<sup>40</sup>
35. Anwaatin submits that discharging the duty to consult is not perfunctory and must be carefully planned and executed. The response from NextBridge to Undertaking J5.1 illustrates that to date, this has taken more than four years and significant resources. And while the Board may reasonably expect efficiencies from Hydro One based on NextBridge's prior capacity building, it would be extremely aggressive to believe that the requisite relationships and results (including procurement and capacity agreements) can be effected in the 45 days proposed by Hydro One.
36. Anwaatin therefore respectfully requests that the Board must weigh the evidence of actual experience and timelines to address the duty to consult and establish the requisite Indigenous relationships against proposed timelines in light of each and all of: (i) discharging the constitutionally-enshrined duty to consult; (ii) the reliability impacts of the duty to consult-related delays on the construction and completion of the EWT Line; and (iii) the economic impacts on communities that are trained for and awaiting employment opportunities related to the LTC Applications.

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<sup>35</sup> *Carrier Sekani*, para 34.

<sup>36</sup> *R v Kapp*, 2008 SCC 41, para 6 [*Kapp*]; *Carrier Sekani*, para 34.

<sup>37</sup> *Kapp*, para 6.

<sup>38</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, para 24.

<sup>39</sup> *Haida*, para 53.

<sup>40</sup> *Tsleil-Waututh*, paras 512, 558-559.

**IV. Requested relief**

37. Anwaatin therefore respectfully requests that the Board condition its decision and approvals on the LTC Applications in order to:
- (a) impose timing and construction milestones to minimize the potential for delay and related reliability impacts in assessing the relative merits of the LTC Applications;
  - (b) ensure that the duty to consult is properly and fully discharged;
  - (c) require significant Indigenous training, procurement, and employment as part of the construction of the EWT Line; and
  - (d) ensure that no further and unnecessary delay is incurred in relation to the long-awaited EWT Line.

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED THIS 31<sup>ST</sup> DAY OF  
OCTOBER, 2018.



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Lisa (Elisabeth) DeMarco  
DeMarco Allan LLP  
Counsel for Anwaatin