

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

ONTARIO ENERGY BOARD

Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure)
Application for Leave to Construct an Electricity Transmission Line
between Thunder Bay and Wawa, Ontario

- and -

Hydro One Networks Inc.
Application to Upgrade Existing Transmission Station Facilities
In the Districts of Thunder Bay and Algoma, Ontario

- and -

Hydro One Networks Inc.
Application for Leave to Construct an Electricity Transmission Line
between Thunder Bay and Wawa, Ontario

FINAL WRITTEN SUBMISSIONS OF THE

BATCHEWANA FIRST NATION

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Part 1: Overview

1. The Batchewana First Nation (“BFN”) joined the Combined Hearing process by way of its intervention on the NextBridge motion for dismissal of Hydro One’s Lake Superior Link Application for Leave to Construct (“LTC”).¹ In that role, BFN made written submissions² in support of the motion, which was ultimately dismissed.³

2. The twin foci of BFN’s concerns, as set out in the Written Submissions on the motion, were:
 - (a) Indigenous consultation as a factor in scheduling and costs of Hydro One’s Application; and

 - (b) Environmental assessments and uncertainties in relation to protection of BFN’s Original Reserve to the extent the proposed Lake Superior Link would directly affect BFN’s rights and interests therein.

3. After the motion for dismissal was itself dismissed, the Board directed the Combined Hearings process that would consider the two competing Applications for LTC and Hydro One’s application for leave to upgrade certain transmission facilities to connect to the East-West Tie (“the “Stations Application”). There appears to be no dispute before the Board that the Stations Application should be granted.

4. By Procedural Order No. 1 on the Combined Hearing, dated August 13, 2018, the Board accepted as intervenors in the Combined Hearing all intervenors in the NextBridge-EWT Application and the Hydro One-Station Upgrades Application, as well as intervenors in the hearing of the NextBridge Motion (existing intervenors). As a result of this Order, BFN is an intervenor in the Combined Hearing and has participated as such.

¹ OEB File No. EB-2017-0364.

² Written Submissions of the Batchewana First Nation, June 06, 2018.

³ OEB, Decision and Order, EB-2017-0364, July 17, 2018.

5. Through the Combined Hearing process, BFN's concerns about consultation and environmental assessment and protection remain and are addressed in this Submission.

Part 2: Indigenous Consultation

6. BFN's perception of the process is that the constitutional duty of the Crown, and responsibilities delegated to the proponents in connection with their respective applications, amount to "now you see it, now you don't", which is to say that for some purposes the proponents emphasize aspects of their engagement with First Nations but do not state that the Board has a role to play in assessing the adequacy of the constitutional duty to consult or its discharge in connection with the competing applications.

7. Hydro One, for example, submits in its Argument-in-Chief the following:

Consideration of the competing merits of the NB and HONI Applications has been **clouded** by considerations of Indigenous consultation and the process for obtaining the required environmental approvals, matters which should not be determinative of which of the LTC Applications should be granted.⁴

8. The next proposition advanced by Hydro One is that the Board has no jurisdiction to consider the issue these issues.⁵ BFN acknowledges prior OEB decisions to that effect, as referred to by Hydro One in its Argument-in-Chief and in BFN's prior Written Submissions on the motion to dismiss.⁶

9. In that earlier submission, BFN stated, and repeats now with respect to both applications:

The issue here, however, is not the adequacy of such consultation as a question of law before this panel, rather recognition of the fact that all antecedent and prospective processes do require Indigenous Consultation as a matter of law and dealing with the

⁴ Argument-in-Chief of Hydro One Networks Inc., October 22, 2018, at para 7. Emphasis added.

⁵ *Id.*

⁶ *Supra* note 2, at para 7.

question of whether those processes, as they relate to the HONI application, can or will be completed in a timely manner and with minimal risk of legal challenge by First Nations and Metis. ⁷

10. The other processes referred to include the relevant Environmental Assessments, be they federal or provincial, which do require Indigenous Engagement and Consultation, as do all permitting procedures. ⁸ BFN argues that significant weight is to be attached to FN/M evidence and to the state of consultations, if only to mitigate the risk of judicial proceedings that could frustrate implementation of the Board's ultimate award of leave to construct.
11. NextBridge does not raise a jurisdictional issue in relation to its Indigenous Consultation, rather points pragmatically to the extent to which it has engaged First Nation and Metis communities as providing some certainty as to the adequacy of its efforts, near-completion of the process and agreements in hand. ⁹ To a large extent, those submissions are made in support of unfavourable comparisons with Hydro One's progress to date, potential costs and other uncertainties.
12. Even so, BFN regards these as matters within the Board's statutory mandate to determine the public interest, being principally consumer interests with respect to prices and the reliability and quality of electricity service to be constructed. ¹⁰
13. Prices being directly related to costs, BFN discerns that the estimates of each proponent appear to be drawing closer and of course defers to the Board as to which are the more reliable, which include more or less certainty and which will bring the new transmission facility online sooner at reasonable cost. Indigenous consultation and accommodation are essential factors in that equation.

⁷ *Id.*

⁸ See, e.g., *Eabemetoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316 (Div. Ct.)

⁹ NextBridge Argument-in-Chief, October 22, 2018: see, e.g., paras 36, 6(f), 62(c) and 69(d).

¹⁰ *Ontario Energy Board Act*, s. 96(2).

14. In fairness, BFN can confirm that it has been contacted by both proponents and is continuing discussions with both at this time. BFN also repeats its earlier submission that it has in the past had constructive and productive negotiations with both. To date, BFN has not had any reason to depart from its earlier support of the NextBridge application.

Part 3: Equity Participation

15. BFN supports in principle the concept that proponents should make arrangements for First Nation and Metis communities to have the opportunity of equity participation in projects such as the E-W Tie or Lake Superior Link; further, that the opportunity for such engagement could and should form part of the terms and conditions imposed by the Board in its decision on the two competing applications.

16. Both proponents have arranged, or have offered, equity participation to the Bamushkwada communities. As these are consistent with BFN's position on such participation, BFN has nothing to add or comment upon in that regard. Notable, however, is that both proponents only offer equity participation to that group and not to other FN/M communities. BFN says that approach to exclusivity is inconsistent with fundamental principles of recognition and reconciliation that courts have endorsed and imposed on both federal and provincial governments.

17. Hydro One points to a public benefit in terms of lower prices by virtue of a First Nation equity partner that brings tax-exempt income to the balance sheet.¹¹ BFN supports that submission and argues that it should be extended to other First Nations who can bring similar exemptions to the table and similar benefits to the public.

18. At the same time, Hydro One suggests that equity participation is a form of accommodation that arises from the duty to consult.¹² BFN says that is incorrect; none of

¹¹ *Supra* note 4, at para 55ff.

¹² Transcript, October 4, 2018, pp. 108-09.

the case law on consultation and accommodation suggests that equity participation in a project is required to deal meaningfully with the protection of Aboriginal and Treaty rights and interests through the constitutional duty to consult. That duty is the Crown's and the Crown is rarely in a position to direct how a private enterprise should organize its business affairs.

19. Instead, BFN sees the opportunity of equity participation by First Nations as a business opportunity that can be demonstrably in the public interest with respect to the proposals under consideration, that is consistent with the broader public policy of recognition and reconciliation and that is, at its heart, a business proposition. BFN is content if the opportunity to purchase equity on normal commercial terms is available, without pre-judging what proportion or aggregate First Nation participation should be negotiable or compelling a result.
20. In BFN's submission, the Board can direct engagement in a process that holds out such opportunities without directing any outcomes. Tangible benefits to consumers could ensue.

Part 4: Environmental Assessments

21. BFN does not intend to belabour the many issues that have arisen in relation to the various environmental assessments, except to point out that several uncertainties remain:
 - (a) The NextBridge EA process is finished, although indications are that its submission is complete, that the EA will prove acceptable and that the decision could come within the next 6 months;
 - (b) It remains unclear whether, if the NextBridge EA is approved, to what extent Hydro One can rely upon it in support of its own application. There is a true conundrum should NextBridge's EA be found to be incomplete or if further studies will be required. To

some extent, Hydro One has attempted to anticipate this contingency by conducting further studies independently;

- (c) Any reliance by Hydro One on information received by NextBridge from First Nations in the course of its consultation or assessments must be tempered by acknowledgment that this information is proprietary to the First Nations concerned, not property of NextBridge and not public information;
- (d) Hydro One continues to place some reliance on a cabinet declaration of exemption in order to advance its own EA on more limited terms, even though there is no precedent for such a declaration in analogous circumstances;
- (e) Hydro One's EA as required by Parks Canada for a revised permit for the proposed corridor through Pukaskwa National Park is not complete and the Board has not had the benefit of direct evidence from Parks Canada; and
- (f) Very recent communications in respect of a possible new EA in relation to the Stations Application create further and profound uncertainty for both proponents. BFN believes the Board should enquire more closely into this unusual and untimely development.

22. BFN supports a decision by the Board that minimizes any uncertainty with respect to the Environmental Assessments while recognizing that some uncertainty may be unavoidable at this stage. As a First Nation with a demonstrated interest in the southeastern segment of the proposed routes, BFN sees its fundamental relationship to the land and its Aboriginal and Treaty rights as directly affected by the construction and operation of whatever line the Board may approve and whichever proponent is granted leave to construct.

Part 5: Conclusion

23. BFN has confidence that the Board will weigh all evidence and all relevant factors, including those set out above, and reach a reasonable decision with respect to the competing LTC applications. BFN supports granting the Station Applications and requests that the Board seek further submissions with respect to recent communications in relation to the Wawa substation.

24. BFN requests that the Board render its decision on these files before the end of the calendar year.

25. BFN seeks a direction from the Board, as part of its Order, that the successful proponent organize and engage in a process that offers a business opportunity to First Nations to acquire an equity interest in the approved project on commercial terms.

26. BFN looks to the Board to ensure that relevant aspects of the duty to consult are given appropriate weight in its decision. In most instances, this will mean due consideration of scheduling, costs, risks and benefits from the perspective of the FNM intervenors and from the Board's proper consideration of factors affecting the public interest.

27. At this point, BFN wishes to express its thanks to the parties, intervenors and Board staff for the quality and depth of the information provided in these Combined Hearings, all of which has served to highlight the important issues to be resolved.

[signature page follows]

Respectfully submitted this 31st day of October, 2018

A handwritten signature in black ink, appearing to read "W.B. Henderson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

William B. Henderson

Of Counsel to the Batchewana First Nation

TO: Ms. Kristen Walli, Board Secretary, Ontario Energy Board

AND TO: Parties and Intervenors as Designated by Procedural Orders