Hydro One Networks Inc.

Lambton to Longwood Transmission Upgrade Project

Application for Leave to Construct under section 92 of the
Ontario Energy Board Act, 1998
Board File No. EB-2012-0082

Written Submissions of Chippewas of the Thames First Nation to the Ontario Energy Board

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 Hydro One Networks Inc. for an order granting leave to construct to upgrade existing transmission line facilities.

Introduction and Summary

1. On March 28, 2012, Hydro One Networks Inc. ("Hydro One") applied to the Ontario Energy Board ("OEB") for an order granting leave to construct to upgrade approximately 70 kilometres of existing 230 kV double circuit transmission lines between Lambton TS and Macksville Junction with a new higher capacity conductor and to replace existing insulators and associated hardware ("Project").

2. Chippewas of the Thames First Nation ("COTTFN") intervened in this proceeding to make submissions to the OEB on whether: (i) the Project is in the public interest; and (2) the Ontario Crown has discharged its duty to consult and accommodate COTTFN in respect of the Project.

3. COTTFN's submissions will be divided into three sections and will address whether:

(a) Hydro One has satisfied the OEB "that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board" as required by s. 97 of the *Ontario Energy Board Act* ("*Act*");[1]

(b) the Project is in the public interest having regard to:

(i) the interest of consumers with respect to the prices of electricity service;

[1] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B.

(ii) the promotion of the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario; and

(c) whether the Crown has discharged its constitutional duties to consult and accommodate COTTFN in respect of the Project.

4. COTTFN respectfully submits that it would be a reviewable error for the OEB to issue an order granting Hydro One leave to construct the Project for four reasons:

(a) the OEB lacks the jurisdiction to grant leave to construct the Project as a result of the operation of s. 97 of the *Act* because Hydro One failed to file sufficient evidence to satisfy the OEB that "it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board";

(b) the OEB lacks the jurisdiction to grant leave to construct the Project pursuant to s. 96(1) because Hydro One failed to file the information required for the OEB to determine whether the Project is in the public interest having regard to the interests of consumers with respect to the price of electricity service;

(c) the OEB lacks the jurisdiction to grant leave to construct the Project pursuant to s. 96(1) because Hydro One failed to establish that the Project will promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario; and

(d) the Project, and the OEB's decision in this proceeding, trigger the Ontario Crown's constitutional duties to consult and accommodate COTTFN in respect of the Project, and the Crown has not yet discharged its duties.

5. For the reasons set out below, COTTFN respectfully submits that the OEB lacks the jurisdiction to make an order granting Hydro One leave to construct the Project until:

(a) Hydro One satisfies the OEB that it has offered or will offer COTTFN a "land-owner's agreement" in a form approved by the OEB. COTTFN respectfully submits that an Impact Benefit Agreement ("IBA") or a Resource Benefit Sharing Agreement ("RBS") constitutes a "land-owner's agreement" appropriately tailored to its unique circumstances;

(b) Hydro One files further information with the OEB about the costs of negotiating and fulfilling its obligations under an IBA or RBS and discharging the Crown's duties to consult and accommodate COTTFN, and the OEB determines whether the Project is in the public interest having regard to the total cost of the Project and the corresponding increase in the price of electricity for consumers;

(c) Hydro One establishes that the Project will promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario to promote Aboriginal participation in renewable energy projects by committing, or providing a commitment on behalf of the OPA, to reserve a minimum of 10% of the existing and new transmission capacity on the Lambton TS to Longwood TS transmission line ("Transmission

Line") for projects with significant participation from Aboriginal communities; and

(d) the Ontario Crown discharges its constitutional duties to consult and accommodate COTTFN in respect of the Project.

6. If the OEB decides to issue an order granting Hydro One leave to construct the Project before the Ontario Crown has discharged its constitutional duties to consult and accommodate COTTFN, then COTTFN respectfully submits that the OEB must include the following condition in its approval:

> The Ontario Crown shall discharge its constitutional duties to consult and accommodate COTTFN before construction of the Project begins.

(a) The OEB lacks the jurisdiction to grant leave to construct the Project as a result of the operation of s. 97 of the *Ontario Energy Board Act*

7. Section 97 of the *Act* provides that leave to construct shall not be granted until "the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board."

8. COTTFN is an "owner of land affected by the approved route or location" within the meaning of s. 97 of the *Act*.

9. COTTFN is an "owner of land". Section 3 of the *Act* provides that "land" includes "any interests in land". In the context of the Project, COTTFN asserts that it has Aboriginal harvesting rights in its traditional territory, Aboriginal title to or at minimum an Aboriginal right to use the air space above the lands in its traditional territory, and an exclusive treaty right to use and enjoy its reserve. [2] COTTFN's Aboriginal rights and title

[2] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at paras. 6, 20, 24-26.

are interests in, and constitute a burden or encumbrance on the title to, the lands on which the Transmission Line is located.[3]

10. COTTFN will be "affected by the approved route or location" because its rights are currently being infringed by the Transmission Line, the Project has the potential to cause new adverse impacts to COTTFN's Aboriginal and Treaty rights,[4] and no economic compensation has been provided to COTTFN for such adverse impacts on its rights and interests.

11. Hydro One's Transmission Line is located in COTTFN's traditional territory, and it is currently infringing COTTFN's Aboriginal and Treaty rights. Chief Miskokomon explained the Crown/Hydro One's ongoing infringement of COTTFN's Aboriginal and Treaty rights as follows:

> ...Hydro One's construction and operation of the Transmission Line constitutes an unauthorized taking up of our traditional territory, including the air space above the lands therein, by the Ontario Crown. Adverse impacts on our Aboriginal and Treaty rights caused by this unauthorized taking up include infringement of our harvesting activities and depriving us of meaningfully sharing in the wealth created by the commercial development of our traditional territory.[5]

12. Chief Miskokomon also indicated that the Ontario Crown and/or Hydro One have failed to compensate COTTFN for the ongoing infringement of its Aboriginal and Treaty rights:

> Hydro One's Transmission Line was built without the Crown having consulted and accommodated COTTFN. The Ontario Crown and/or Hydro One are not sharing the revenues generated by the transmission of electricity through our traditional territory with COTTFN despite the fact

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[3] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 138, 145 [*Delgamuukw*]; *Haida Nation v. British Columbia (Minister of Forests)* (1997), 153 D.L.R. (4th) 1 at paras. 5-6; *R. v. N.T.C. Smokehouse Ltd.* (1991), 80 B.C.L.R. (2d) 158 at para. 214, appeal dismissed by the SCC, [1996] 2 S.C.R. 672.

[4] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at paras. 32-34.

[5] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at para. 28.

> that the construction and operation of the Transmission Line constitutes an ongoing infringement of our Aboriginal and Treaty rights. No Impact Benefit Agreements ("IBA") or Resource Benefit Sharing Agreements ("RBS") have ever been negotiated between COTTFN and Hydro One/Ontario Crown with respect to the Transmission Line.[6]

13. The Supreme Court has recognized that fair compensation may be required when Aboriginal rights (including title) are infringed.[7] In *Delgamuukw v. British Columbia*, Chief Justice Lamer, writing for the majority of the Supreme Court of Canada, held that economic compensation will ordinarily be required when Aboriginal title is infringed:

> ...In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated...[8] [emphasis added]

14. Despite the fact that COTTFN is an "owner of land affected by the approved route or location" of the Project, Hydro One has failed to file a "land-owner's agreement" tailored to the unique circumstances of COTTFN's rights for the OEB to approve, as well as any evidence that Hydro One has offered or will offer COTTFN a "land-owner's agreement".[9]

15. The OEB therefore lacks the jurisdiction to grant leave to construct as a result of the operation of s. 97 of the *Act* because there is an insufficient evidentiary basis for Hydro One to satisfy the OEB that "it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board."

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[6] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at para. 29.
[7] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*] at pp. 45-46.
[8] *Delgamuukw, supra* note 3 at para. 169.
[9] The Real Estate Agreements that Hydro One filed with the OEB are located in Exhibit B-6-6, Attachments 2-4, and do not include any agreements with COTTFN.

16. COTTFN submits that an IBA or RBS constitutes a "land-owner's agreement" which is appropriately tailored to its unique circumstances. IBAs or RBSs are agreements between Aboriginal groups and the Crown/project proponents that define the scope of a project's impacts on Aboriginal and treaty rights, and, amongst other things, provide compensation (benefits) to the Aboriginal group for infringement of its rights and interests in the land on which the project will be built.

(b) The OEB lacks the jurisdiction to grant leave to construct the Project under s. 96(1) because Hydro One failed to establish that the Project is in the public interest

17. Pursuant to s. 96(2) of the *Act*, the OEB must consider the following two factors to determine whether Hydro One's application for leave to construct the Project under s. 92 is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

18. The OEB lacks the jurisdiction to issue an order granting Hydro One leave to construct the Project pursuant to s. 96(1) of the *Act* because Hydro One failed to:

(i) file the information required for the OEB to determine whether the Project is in the public interest having regard to the interests of consumers with respect to the price of electricity service; and

(ii) establish that the Project will promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario.

(i) Hydro One failed to file the information required for the OEB to determine whether the Project is in the public interest having regard to the interests of consumers with respect to the price of electricity service

19. It is necessary for the OEB to determine the total cost of the Project to assess the Project's impacts on the price of electricity service. The OEB cannot determine whether the total cost of the Project as submitted by Hydro One is accurate on the basis of the evidence filed in this proceeding for at least two reasons.

20. First, for the reasons set out in Appendix I and Chief Miskokomon's affidavit, COTTFN asserts that:

(a) the Ontario Crown owes COTTFN a constitutional duty to consult and accommodate it in respect of the Project;

(b) the effect of good faith consultation will be to reveal a duty to accommodate COTTFN, and that sharing revenue generated by the transmission of additional electricity through COTTFN's traditional territory is the most appropriate form of accommodation to minimize the effects of infringement on COTTFN's rights and interests; and

(c) the Ontario Crown has failed to discharge its duty to consult and accommodate COTTFN.

21. Hydro One failed to file evidence establishing either that the Ontario Crown discharged its duties to consult and accommodate COTTFN or the costs that the Crown/Hydro One will incur in so doing.

22. This is important because the costs associated with required Crown consultation with, and accommodation of, COTTFN could substantially increase the total cost of carrying out the Project in the following ways:

(a) Hydro One will incur additional costs in carrying out the Ontario Crown's duties to the extent that the Crown continues to delegate procedural aspects of its duties to Hydro One;

(b) the outcome of good faith consultation will likely be to reveal a duty to accommodate, which, in COTTFN's respectful submission, will require the Ontario Crown/Hydro One to share the revenue generated by the transmission of additional electricity through COTTFN's traditional territory with it; and

(c) Crown consultation with COTTFN is required before construction begins. This could delay construction of the Project and, as a result of inflation, increase the cost of building the Project.

23. Second, for the reasons set out above, Hydro One will need to incur costs to compensate COTTFN for the Transmission Line's ongoing infringement of its Aboriginal and Treaty rights before it can proceed with the construction and operation of the Project. Hydro One failed to determine and file an estimate of those costs with the OEB.

24. Given that these two categories of costs could substantially increase the cost of the Project and Hydro One failed to file estimates of such costs, the OEB has an incomplete evidentiary record upon which to determine whether the Project is in the public interest having regard to the interests of consumers with respect to the price of electricity service.

25. The OEB therefore lacks the jurisdiction to grant leave to construct the Project pursuant to s. 96(1) because Hydro One failed to file the information required for the OEB to determine whether the Project is in the public interest having regard to the interests of consumers with respect to the price of electricity service.

(ii) Hydro One failed to establish that the Project will promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario

26. Hydro One's submissions indicate that the Project will "enable approximately 500 MW of renewable generation in the west of London transmission area", and will "increase transfer capability to enable approximately an additional 100 MW of firm capacity to be delivered from the West of London transmission area to the rest of the province".[10] Implicit in Hydro One's submissions is that the Project is in the public interest because it will promote renewable energy sources by increasing the amount of electricity that Hydro One can deliver on the Transmission Line.

27. The issue is whether the Project promotes renewable energy sources in a manner consistent with the policies of the Government of Ontario.

28. In an April 5, 2012 letter which is attached as Exhibit "H" to Chief Miskokomon's affidavit, the Honourable Chris Bentley provided directions to the OPA in respect of its Feed-In Tariff Program. In his letter, Energy Minister Bentley:

(a) stated that the Ontario Government is committed to "Reserving a minimum of 10 per cent of remaining capacity for projects with significant participation from local or Aboriginal communities"; and

(b) directed the OPA, in offering contracts for small and large FIT Projects, to allocate out of available capacity "a minimum of 100 MW for projects with greater than or equal to 50 per cent community and Aboriginal equity participation..."

29. Hydro One's response to COTTFN's written interrogatory #2(3) provides Hydro One (and the OPA's) position that the Energy Minister's Directive is at a Provincial

[10] Hydro One's Final Submissions, Page 1 of 3.

level and, therefore, they are unable to determine whether any, or what percentage, of the existing or newly created transmission capacity enabled through the Project will be allocated to renewable energy generation projects with significant participation from Aboriginal communities.

30. There is no guarantee that any of the existing or new transmission capacity on the Transmission Line will be reserved or allocated to renewable energy generating projects with significant participation from Aboriginal communities, including but not limited to COTTFN.

31. There is therefore no basis for the OEB to conclude that the Project is in the public interest because it promotes renewable energy sources in a manner that is consistent with the Government of Ontario's policies set out in Energy Minister Bentley's April 5, 2012 directives to the OPA.

32. Furthermore, COTTFN respectfully submits that existing and new transmission capacity on the Transmission Line should be allocated having regard to its Aboriginal and Treaty rights. As Chief Miskokomon stated at paragraph 43 of his affidavit:

> The allocation of existing and new transmission capacity on the Transmission Line to renewable energy generating projects with significant participation from Aboriginal communities should be done taking into account treaty rights and treaty peoples. Concretely this means that Aboriginal communities whose traditional territories are crossed by the Transmission Line, including COTTFN, should be given priority access to existing and new transmission capacity on the Line to transmit electricity from current or planned renewable energy projects.

33. COTTFN is in the process of assessing the feasibility of developing a 10 MW solar power plant in its traditional territory. Hydro One's response to COTTFN's written interrogatories clarifies that the Project will not necessarily provide COTTFN with required access to transmission capacity to develop its solar project. If this occurs, COTTFN's Aboriginal and Treaty rights will be impacted by the Project without enabling

it to develop renewable energy projects in its traditional territory. Such a result is fundamentally inconsistent with the Government of Ontario's policies and the honour of the Crown.

(c) The Ontario Crown has failed to discharge its constitutional duties to consult and accommodate COTTFN in respect of the Project

34. A thorough review of Hydro One's engagement activities[11] reveals that the Ontario Crown has failed to consult and accommodate COTTFN in respect of the Project's potential to cause the adverse effects set out in Chief Miskokomon's affidavit.[12]

35. In any event, there is no evidence before the OEB to provide a basis for it to conclude that the Ontario Crown has even evaluated whether the Crown conduct has the potential to adversely impact COTTFN's rights. In response to COTTFN's written interrogatory #4(6), Hydro One stated that it "is unaware of any determinations made by the Ontario Crown regarding whether the proposed Project may adversely impact the Chippewas of the Thames First Nation Aboriginal and Treaty rights". It necessarily follows from Hydro One's submission that there is no basis for the OEB to conclude that the Ontario Crown has discharged its constitutional duties to consult and accommodate COTTFN.

36. Unlike other applications for leave to construct before the OEB, COTTFN's concerns are not limited to environmental impacts and, in any event, the Ministry of Environment will not be consulting COTTFN about its concerns in the future given Hydro One's submission that the Project has been "screened-out under the *Class*

[11] Hydro One filed a record of its "consultation" activities on June 29, 2012 in response to COTTFN's written interrogatories, Exhibit I-2-4, Attachment 1.
[12] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at paras. 32-34.

Environmental Assessment for Minor Transmission Facilities".[13] The regulatory processes for outstanding permits, licences, and approvals that Hydro One requires to construct the Project will not provide a proper forum for the Crown to adequately consult or accommodate COTTFN.[14]

37. Moreover, the OEB is "an agent of Her Majesty in right of Ontario".[15] Its decision on whether to issue an order granting leave to construct the Project constitutes Crown conduct capable of triggering the Ontario Crown's duties to consult and accommodate COTTFN because the effect of granting such an order, i.e. authorizing the Project to be constructed, has the potential to adversely impact COTTFN's Aboriginal and Treaty rights.

38. The OEB is not, however, empowered under the *Act* to carry out the Crown's consultation and accommodation duties. The OEB has also taken the position that it has a very limited jurisdiction to determine whether the Ontario Crown's duties have been discharged. In Procedural Order No. 2, the OEB described its jurisdiction as follows:

> Only Aboriginal consultation and accommodation issues which fall within the specific criteria of section 96(2) will be considered within the scope of this proceeding.

39. Despite the OEB's jurisdictional limitations, lack of statutory power to consult and accommodate COTTFN, and because the OEB's decision triggers the duty to consult and there are no other regulatory proceedings in which COTTFN's concerns can be adequately addressed, it would be a reviewable error for the OEB to issue an order granting leave to construct before the Ontario Crown discharges its duties to consult and accommodate COTTFN.

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[13] Hydro One's Final Submissions, Page 2 of 3.
[14] Hydro One filed a "preliminary" list of outstanding permits, licences, and approvals that it requires to complete construction of the Project: Exhibit I-1-7, Attachment 1.
[15] *Ontario Energy Board Act, 1998*, S.O., c. 15, Schedule B, s. 4(4).

40. If, nevertheless, the OEB decides to issue an order granting Hydro One leave to construct the Project before the Ontario Crown has discharged its constitutional duties to consult and accommodate COTTFN, then COTTFN respectfully submits that the OEB must make its order granting leave to construct the Project conditional on the Ontario Crown discharging its duties to consult and accommodate COTTFN before construction of the Project begins.

Closing

41. While the OEB currently lacks the jurisdiction to issue an order granting Hydro One leave to construct the Project, COTTFN anticipates that Hydro One and the Ontario Crown, working together with COTTFN, will be able to ensure that: (i) COTTFN is properly consulted and accommodated (thereby satisfying the honour of the Crown and fulfilling the Crown's constitutional duties); and (ii) the required information is put before the OEB to assist it in determining whether the Project is in the public interest.

DATED AT Toronto, Ontario this 20th day of July, 2012.

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Appendix I: COTTFN's submissions that the Ontario Crown has failed to discharge its constitutional duties to consult and accommodate COTTFN

1. The Ontario Crown owes COTTFN constitutional duties to consult it about the Project and to accommodate it in respect of the Project's potential to adversely impact its Aboriginal and Treaty rights. The Ontario Crown's duties to consult and accommodate COTTFN are at the high end of the spectrum described by the Supreme Court in *Haida*,[16] and require the Crown/Hydro One to share the revenue generated by the transmission of additional electricity through COTTFN's traditional territory. The evidentiary record before the OEB and, in particular, COTTFN's submissions to the OEB demonstrate that the Ontario Crown's consultation and accommodation duties have not been discharged.

The Ontario Crown owes COTTFN duties to consult and accommodate it in respect of the Project

2. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[17] Chief Justice McLachlin, writing for a unanimous Supreme Court, clarified that the Crown's duty to consult Aboriginal groups is triggered when: (1) the Crown has knowledge of a potential Aboriginal claim or right; (2) contemplates conduct; and (3) the contemplated conduct has the potential to adversely affect an Aboriginal claim or right.[18]

3. The Ontario Crown's constitutional consultation and accommodation duties have been triggered by the Project because the three requirements set out by the Supreme Court in *Carrier Sekani* are satisfied in the context of Hydro One's application.

4. Hydro One and the Ontario Ministry of Energy have expressly recognized that they have knowledge of COTTFN's Aboriginal and Treaty rights in the proposed Project area. In a letter to Hydro One dated August 12, 2011, the Ontario Ministry of

[16] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*].
[17] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 [*Carrier Sekani*].
[18] *Ibid.* at para. 31.

Energy identified Chippewas of the Thames as a First Nation having known or asserted Aboriginal or treaty rights in the proposed Project area.[19]

5. It is implicit in Hydro One's submissions, in which it has repeatedly stated that it is "undertaking the procedural aspects of consultation with potentially-affected First Nations and Métis communities on behalf of the Crown",[20] that the Project involves Crown conduct capable of triggering the Ontario Crown's consultation and accommodation duties. Hydro One is an Ontario Crown corporation. Its proposal to carry out the Project is clearly proposed Crown conduct.[21] Moreover, the OEB is "an agent of Her Majesty in right of Ontario",[22] and its decision in this proceeding constitutes Crown conduct capable of triggering the Ontario Crown's duties.

6. The conduct contemplated by the Ontario Crown has the potential to adversely impact COTTFN's Aboriginal and Treaty rights. In his affidavit, Chief Miskokomon describes the three ways by which the Project has the potential to cause new adverse impacts on COTTFN's Aboriginal and Treaty rights:

> First, construction activities may affect our ability to harvest in our traditional territory. No Traditional Land Use Studies or Traditional Ecological Knowledge Studies have been carried out to determine the extent that construction activities may adversely impact our ability to harvest resources in our traditional territory.
>
> Second, construction activities may disrupt burial grounds or otherwise impact important cultural sites located in our traditional territory. Hydro One stated in its response to our written interrogatory #3(7)(d) that it has not completed the required Stage 2 Archaeological Study for the Project. Ongoing consultation and accommodation with COTTFN is required to minimize or prevent adverse impacts to burial grounds and other important cultural sites.

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[19] Exhibit B, Tab 6, Schedule 5, Page 1 of 4.
[20] Exhibit A, Tab 1, Schedule 1, Page 3 of 5; see also Exhibit B, Tab 6, Schedule 5, Page 1 of 4.
[21] See, for example, *Carrier Sekani, supra* note 17 at para. 81 where a unanimous SCC held that: "BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia."
[22] *Ontario Energy Board Act, 1998*, S.O., c. 15, Schedule B, s. 4(4).

> Third, upgrades to the transmission line constitute a further and enhanced unauthorized taking up of air space above the lands in our traditional territory and infringement of our Aboriginal harvesting rights. We understand Hydro One will have the capacity to transmit an additional 500 MW of electricity on the Transmission Line following the upgrades. The effect of the OEB granting Hydro One leave to upgrade the lines without requiring the Ontario Crown to consult and accommodate COTTFN will be a further and enhanced taking up without compensation or sharing of revenue to accommodate the new and additional impacts to our Aboriginal and Treaty rights.[23]

The scope and the content of the Ontario Crown's duties to consult and accommodate COTTFN

7. In *Haida*, the Supreme Court held that the scope of the Crown's duties to consult and accommodate depends on two factors: (1) a preliminary assessment of the strength of the case supporting the existence of the right or title; and (2) the seriousness of the potential adverse effect upon the right or title claimed.[24]

8. A preliminary assessment indicates that there is a strong basis for the Aboriginal and Treaty rights asserted in Chief Miskokomon's affidavit.

9. The interpretation of the treaties between COTTFN's ancestors and the Crown "must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]".[25] The interpretation which reflects the common intention of the treaty parties that best reconciles the treaty signatories' interests with those of the Crown must be adopted. As a majority of the Supreme Court stated in *R. v. Marshall*:[26]

> 14 Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger, supra*, at para. 52:

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[23] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at paras. 32-34.
[24] *Haida, supra* note 16 at para. 39.
[25] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at p. 49.
[26] *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 14 [*Marshall*].

> . . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui, supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added by SCC in *Marshall*]

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui, supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (*Sioui, per* Lamer J., at p. 1069 (emphasis added)). In *Taylor and Williams, supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by

the Crown.[27]

10. The extrinsic evidence in Chief Miskokomon's affidavit must be used to identify the common intentions of the treaty parties. In *Marshall,* the Supreme Court articulated the following principles with respect to the use of extrinsic evidence:

(1) Extrinsic evidence can be used to show that a written document does not include all the terms of an agreement and it can also be used to then supply missing terms;

(2) Historical and cultural context can be used as interpretive aids even if the treaty document purports to contain all of the terms and even absent any ambiguity on its face; and

(3) An overly deferential attitude to the written document is inconsistent with a proper recognition of the difficulties of proof facing aboriginal peoples.[28]

11. Having regard to the extrinsic evidence in Chief Miskokomon's affidavit, COTTFN has established a strong *prima facie* basis for its claim that: (i) COTTFN has Aboriginal harvesting rights in its traditional territory; (ii) COTTFN has Aboriginal title to or at minimum an Aboriginal right to use the air space above the lands in its traditional territory; (iii) COTTFN has an exclusive treaty right to use and enjoy its reserve; and (iv) the Crown does <u>not</u> have a right to take up land in a way that would adversely impact or diminish the geographic scope of COTTFN's harvesting rights.

12. As outlined above in paragraph 6, the Project has the potential to cause serious adverse impacts on COTTFN's Aboriginal and Treaty rights. In particular, the Project, if approved, will constitute a further and enhanced unauthorized use of COTTFN's traditional territory – i.e. taking up of air space above the lands in their traditional territory – without any financial compensation being paid to COTTFN.

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[27] Applied by the SCC in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388 at para. 28.

[28] *Marshall, supra* note 26 at paras. 10-11 and 20; summarized in J. Woodward, *Native Law,* loose-leaf (Toronto: Thomson Reuters Canada Limited) at pp. 408-408.1.

13. Given the strength of the case supporting the existence of the rights asserted by COTTFN and the seriousness of the potential adverse effects on COTTFN's Aboriginal and Treaty rights, deep consultation, aimed at finding a satisfactory interim solution is required. As Chief Justice McLachlin, writing for a unanimous Supreme Court stated in *Haida*:

> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

14. COTTFN respectfully submits that the effect of good faith consultation will be to reveal a duty to accommodate, and that COTTFN should be able to negotiate a share of the revenues generated by the transmission of additional electricity through COTTFN's traditional territory as a form of accommodation to "minimize the effects of infringement" on its rights.[29] As Chief Justice McLachlin, writing for a unanimous Supreme Court stated in *Haida*:

> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[29] See, for example, *Sparrow, supra* note 7 at pp. 45-46 and *Delgamuukw, supra* note 3 at para. 169.

15. The Ontario Government expressly recognized that Aboriginal communities have an interest in economic benefits from new transmission projects crossing through their traditional territories. Attached as Exhibit "G" to Chief Miskokomon's affidavit is the Government of Ontario's Long-Term Energy Plan. On page 49 of the Plan, Ontario states that:

> Ontario recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of that interest may vary between communities.

The Ontario Crown has failed to discharge its duties to consult and accommodate COTTFN

16. A thorough review of Hydro One's engagement activities[30] reveals that the Ontario Crown has failed to consult and accommodate COTTFN in respect of the Project's potential to cause the adverse effects set out in Chief Miskokomon's affidavit.[31]

17. In any event, there is no evidence before the OEB to provide a basis for it to conclude that the Ontario Crown has even evaluated whether the Crown conduct has the potential to adversely impact COTTFN's rights. In response to COTTFN's written interrogatory #4(6), Hydro One stated that it "is unaware of any determinations made by the Ontario Crown regarding whether the proposed Project may adversely impact the Chippewas of the Thames First Nation Aboriginal and Treaty rights". It necessarily follows from Hydro One's submission that there is no basis for the OEB to conclude that the Ontario Crown discharged its constitutional duties to consult and accommodate COTTFN.

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[30] Hydro One filed a record of its "consultation" activities on June 29, 2012 in response to COTTFN's written interrogatories, Exhibit I-2-4, Attachment 1.

[31] Written Evidence of COTTFN, Affidavit of Joe Miskokomon, Chief of Chippewas of the Thames First Nation, at paras. 32-34.