

November 7, 2017

VIA RESS, E-MAIL, AND COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms Walli:

**RE: Ontario Energy Board File Numbers EB-2017-0182/EB-2017-0194
Upper Canada Transmission, Inc. and
Hydro One Networks Inc (“HONI”)—East-West Tie Line Project
Métis Nation of Ontario Intervention Request**

We are legal counsel for the Métis Nation of Ontario (MNO) in relation to the above-mentioned matter. Please accept the following as the MNO’s request for intervenor status under OEB Rule 22.05, and an award of costs for participation in the abovementioned proceeding.

The Proposed Intervenor

The Métis are one of the three aboriginal peoples of Canada recognized within s. 35 of the *Constitution Act, 1982*. The MNO represents the citizens of the Métis Nation living in Ontario as well as various regional rights-bearing communities throughout Ontario. The MNO obtains its mandate to represent its citizens and communities through a Métis-specific governance structure which includes: a centralized citizenship registry; democratically elected leadership at the regional and provincial levels; and 30 Chartered Community Councils. For more information on the MNO, please see: www.metisnation.org.

More specifically, in relation to the proposed East-West Tie Transmission Line and associated infrastructure (the “Project”), the MNO represents two regional right-bearing Métis communities whose traditional territories will be directly impacted. These Métis communities, as represented through the MNO’s governance structures, meet the criteria set out in *R. v Powley*, [2003] 2 SCR 207. One of the communities is the Sault Ste. Marie Métis community, which was recognized in the *Powley* case by the Supreme Court of Canada. Both communities have asserted and/or established rights, interests and claims that will be impacted by the Project, which are protected by section 35 of the *Constitution Act, 1982*. These collectively-held rights, interests and claims require Crown consultation in relation to the Project.

The first impacted regional rights-bearing Métis community represented by the MNO is the Northern Lake Superior Métis Community. This community was “jointly identified” by the MNO and Ontario as a “historic Métis communit[y] that meet[s] the criteria provided by the Supreme Court of Canada in *R. v. Powley*.” This historic community includes “the inter-connected historic Métis populations north of Lake Superior, including the Métis people who worked for periods of time or settled as: Michipicoten, Pic River, Fort William, Nipigon House and Long Lake.”¹ Members of this contemporary rights-bearing Métis community—the descendants of the historic Métis population described above—live, use, and rely on a territory that includes the MNO identified harvesting areas of Lakehead, Nipigon, and Michipicoten. This community is represented by the MNO’s regionally elected leadership, the Thunder Bay Métis Council, the Greenstone Métis Council, and the Superior North Métis Council.² These Councils, along with the MNO’s provincial and regional leadership, have executed a Regional Consultation Protocol, which sets out how they will work together to ensure this Métis community is meaningfully consulted and accommodated. A copy of this Protocol is available at: <http://ww.metisnation.org/governance/reference-documents/>.

The second affected regional rights-bearing Métis community represented by the MNO is the Sault Ste. Marie Métis Community. Members of this contemporary rights-bearing Métis community live, use, and rely on a territory that includes the MNO identified harvesting areas of Sault Ste. Marie and Michipicoten. This community is represented by the MNO’s regionally elected leadership, the Historic Sault Ste. Marie Council, and the North Channel Métis Council.³ These Councils, along with the MNO’s provincial and regional leadership, have executed a Regional Consultation Protocol, which sets out how they will work together to ensure this Métis community is meaningfully consulted and

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- ¹ Government of Ontario Newsroom, “Identification of Historic Métis Communities in Ontario,” 22 August 2017, <https://news.ontario.ca/mirr/en/2017/08/identification-of-historic-metis-communities-in-ontario.html>
- ² These MNO Councils are “Crown-identified Aboriginal communities” for the purposes of consultation related to the Project. The MNO and the Councils never accepted the Crown’s determination that they are separate and distinct Métis communities. They collectively represent a regional rights-bearing Métis community based on historic and contemporary facts, consistent with *R. v. Powley*, [2003] 2 S.C.R. 207 and subsequent Métis rights case law. Since Ontario made this designation, however, as explained above, the MNO and Ontario have come to a joint understanding that there is one regional rights-bearing historic Métis community in this area, as described above: the “Northern Lake Superior Métis Community.”
- ³ The MNO and its Sault Ste. Marie and North Channel Métis Councils, as the collective representatives of the Sault Ste. Marie Métis community, have not been identified by the Crown for consultation related to the Project, despite the fact that First Nations (i.e., Ojibways of Garden River, Ojibways of Batchewana) who are similarly situated and have a common territory with this Métis community have been identified for consultation. The MNO believes this exclusion of the Sault Ste. Marie Métis community from identification for consultation is a breach of the Crown’s duty to consult and accommodate this Métis community, which has been recognized by the Supreme Court of Canada in *R. v. Powley*, [2003] 2 S.C.R. 207.

accommodated. A copy of this Protocol is available at:
<http://www.metisnation.org/governance/reference-documents/>

A map outlining the geography of the abovementioned Métis communities and the administrative boundaries of the MNO's governance structures at the local and regional levels, in relation to the Project, is attached.

Interest in the Proceeding

The Project will pass through and impact the traditional territories of the above-mentioned Métis communities. As such, Métis rights and interests are potentially impacted in relation to the planning and development of the Project. As well, the Project will enable future generations and transmission projects within these Métis traditional territories, which the MNO has concerns with respect to.

In the designation process, the Board weighed the proponents' commitment to First Nations and Métis participation. Therefore, part of the reason Upper Canada Transmission Inc received the designation was its commitment to negotiate participation agreements with Métis, although the OEB recognized these were "more limited" than participation for some First Nations.⁴ The OEB cannot assess whether Upper Canada Transmission has been "committed" to its plan, without the MNO, as the representative of two impacted rights-bearing Métis communities.

We further understand that Ontario intends to rely on the Board's process to discharge its constitutional duty to consult, as it permitted: "the Crown may rely on steps taken by an administrative body to fulfill its duty to consult."⁵ Without the MNO's participation, Ontario will not be able to rely on the OEB to discharge its duty. In the MNO's opinion, the Board will, at the stage of leave to construct, need to assess whether or not the proponents have carried out the procedural aspects of Crown consultation with Métis communities, as well as consider whether the Crown's duty to consult has been fulfilled.⁶ In order for the Board to have both procedural and substantive information to make determinations on the duty to

⁴ Ontario Energy Board, Phase 2 Decision and Order, at p 17, available online at:
https://www.oeb.ca/oeb/Documents/EB-2011-0140/Dec_Order_Phase2_East-WestTie_20130807.pdf

⁵ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 32; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 30 [*Chippewas*].

⁶ This is because the OEB is a final decision maker on a project that will impact Aboriginal rights due to the operation of section 92 of the *Ontario Energy Board Act*. As stated in *Chippewas*: "[37] As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (Clyde River, at para 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (Clyde River, at para 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77)."

consult, the affected Métis communities, as represented by the MNO, must be intervenors in the proceeding.

Reasons for Late Application

The MNO regrets the lateness of its application for intervenor status. The primary reason for this delay was difficulties in receiving direction from various elected leadership within the MNO to proceed with the application to leave to intervene.

Request for Costs

The MNO is seeking costs in order to participate as an intervenor in the proceeding. As set out above, the MNO is a necessary intervenor in order to assist the Board in meeting the Minister's directives vis-à-vis aboriginal participation and consultation.

Contact Information

If granted intervenor standing, the following contact information should be used by the Board and Parties to the proceedings.

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We look forward to hearing from the Board with respect to my client's request for intervenor status.

Yours very truly,

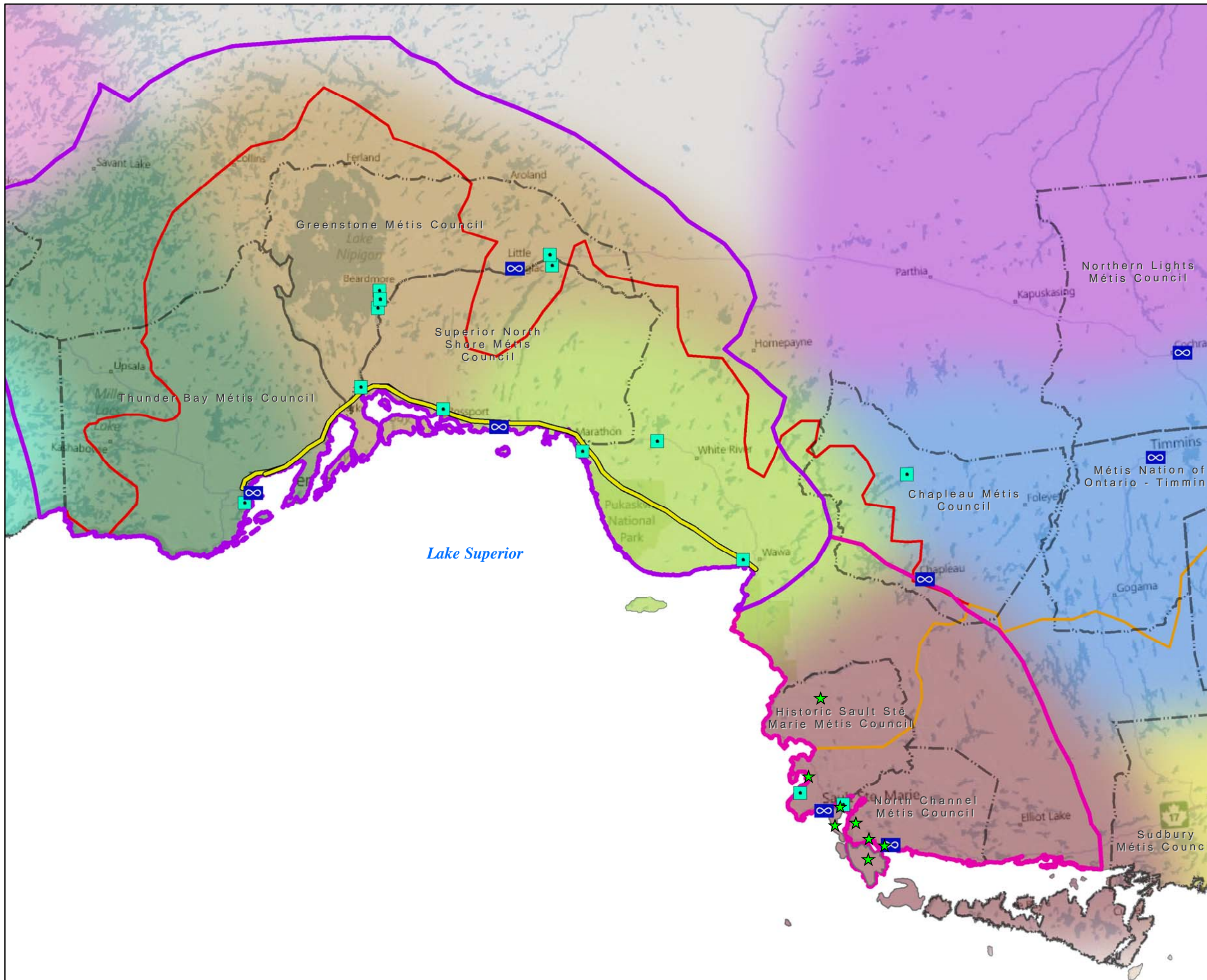
Jason Madden




















Attach: Map of Métis Communities and Project

cc Eryn MacKinnon, Senior Regulatory Coordinator, Hydro One Networks Inc. (via email)
Michael Engelberg, Assistant General Counsel, Hydro One Networks Inc. (via email)

Krista Hughes, NextBridge Infrastructure c/o Regulatory Affairs (via email)
Fred Cass, Aird & Berlis LLP, legal counsel to NextBridge Infrastructure (via email)
Margaret Froh, MNO President
MNO Consultation Committee—Lakehead/Nipigon/Michipicoten Territories
MNO Consultation Committee—Sault Ste. Marie Territory
Joanne Meyer, MNO Chief Operating Officer
Jennifer St. Germaine, MNO Chief Strategic Officer
Aly Alibhai, MNO Director, Lands, Resources and Consultation Branch



Legend

-  East-West Transmission Line
- Métis Consultation Protocol Areas**
-  Lakehead/Nipigon/Michipicoten
-  Sault Ste Marie Region
- Métis Traditional Harvesting Territories**
-  Abitibi/Temiscamingue
-  Historic Sault Ste. Marie
-  James Bay
-  Lake of the Woods/Lac Seul
-  Lakehead
-  Michipicoten
-  Nipigon
-  Rainy Lake/Rainy River
-  Locations Identified As Part of Sault Ste. Marie Métis Community in R. v. Powley
- MNO Community Councils**
-  Administrative Boundaries
-  Office or Mailing Address Location
- Treaty Territories**
-  Robinson Huron Treaty
-  Robinson Superior Treaty
- First Nations Identified for Consultation**
-  First Nation

Métis Communities and Proposed East-West Tie Transmission Project (Territories and Administrative Geography)

