

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Hydro One Networks Inc. for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018;

AND IN THE MATTER OF the Decision of the Ontario Energy Board on the Application dated September 28, 2017;

AND IN THE MATTER OF Rules 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

**FACTUM OF
ANWAATIN INC.**

January 15, 2018

Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
200-5 Hazelton Avenue
Toronto, ON M5R 2E1
Tel: 647-991-1190
Fax: 1-888-734-9459
E-mail: lisa@demarcoallan.com

Cary Ferguson
DeMarco Allan LLP
200-5 Hazelton Avenue
Toronto, ON M5R 2E1
Tel: 647-983-2084
Fax: 1-888-734-9459
E-mail: cary@demarcoallan.com

Counsel to Anwaatin Inc.

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF the EB-2016-0160 application by Hydro One Networks Inc. (**Hydro One**) for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018 (the **Application**);

AND IN THE MATTER OF the final Decision of the Ontario Energy Board on the Application dated September 28, 2017, as amended on November 1, 2017 (the **Decision**);

AND IN THE MATTER OF Rules 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

FACTUM OF ANWAATIN INC.

January 15, 2018

PART 1 – OVERVIEW OF THE MOTION

1. This motion (**Motion**) is made by Anwaatin Inc. (**Anwaatin**) pursuant to Rules 40, 42 and 43 of the Ontario Energy Board's (**OEB's** or the **Board's**) *Rules of Practice and Procedure*.
2. Anwaatin seeks an order that the Decision be reviewed and varied in a manner that:
 - (a) considers, decides upon, and provides reasons for, the lengthy and significant First Nations electricity reliability issues raised in the Application including:
 - i. the Anwaatin and Hydro One reliability disparity evidence showing that reliability in the Anwaatin First Nations Communities is 2081% (20.81 times) worse than the Ontario average and approximately four (4) times worse than reliability in Northern Ontario (the **Anwaatin Reliability Disparity Evidence**);

- ii. the Anwaatin band council video evidence and Dr. Richardson's written and oral evidence on the significant, negative impacts of the poor and disparate transmission reliability on the Anwaatin First Nations Communities set out in the record and at Volume 13 of the EB-2016-0160 Hearing Transcripts (the **Anwaatin Reliability Impact Evidence**, collectively, with the Anwaatin Reliability Disparity Evidence, referred to herein as the **Anwaatin Reliability Evidence**); and
 - iii. the Anwaatin final argument wherein it summarized the relevant Anwaatin and Hydro One evidence and requested that the Board earmark a portion of Hydro One's approved capital budget in order to address and remedy the outdated, outlier transmission assets (A4L, T7M, and M9K) that are the cause of the extremely poor and disparate electricity transmission system reliability in the Anwaatin communities (the **Anwaatin Requested Relief**); and
- (b) grants the Anwaatin Requested Relief.
3. Anwaatin consists of a group of Ontario-based First Nations including Aroland First Nation, MoCreebec Eeyoud, and Waaskiinaysay Ziibi Inc. Development Corporation, an economic development corporation representing Rocky Bay First Nation, Bingwi Neyaashi Anishinaabek, Red Rock Indian Band, Whitesand First Nation, and Animbiigoo Zaagiigan Anishinaabek (collectively the **Anwaatin First Nations Communities**), that are materially and adversely impacted by issues of energy poverty and poor electricity reliability in their communities. Anwaatin was granted full Intervenor status by the Board to examine and assist the Board in its consideration of these issues in the context of the Application.¹

¹ EB-2016-0160, Procedural Order No. 1, dated July 29, 2016 [**PO1**], at 2.

4. Anwaatin participated very actively, asking written interrogatories and cross examining, on the issues of disparate and poor electricity reliability in First Nations communities and the impact of that poor reliability on those communities.²
5. The Board also granted Anwaatin express leave³ to adduce evidence and be examined on issues including the extremely poor electricity reliability the Anwaatin First Nations Communities endure, and Anwaatin invested the time and resources to adduce both consultant evidence and direct First Nations community video evidence on electricity reliability.
6. Anwaatin therefore had a legitimate expectation that the Board would consider, decide upon, and provide reasons for, the Board's decision on the Anwaatin reliability issues in the Decision.
7. Nowhere in the Board's 120-page Decision does it make any mention of, consider, decide upon, or provide any reasons related to, the significant First Nations electricity reliability issues or the Anwaatin Requested Relief – despite the Board's express leave for Anwaatin to introduce evidence on such issues.
8. Anwaatin submits that the Board's failure to consider and provide reasons for its Decision, or lack of decision, on the Anwaatin Reliability Disparity Evidence, Anwaatin Reliability Impact Evidence, and the Anwaatin Requested Relief:

- (a) constitutes an error of law by failing to discharge the Board's statutory duties in this Application and within its statutory mandate set out in sections 1(1)(1), 1(1)(2), 19(1),

² EB-2016-0160, Interrogatories to Hydro One filed by Anwaatin Inc., dated August 12, 2016; EB-2016-0160, Transcript Volume 2, dated November 25, 2016, 60-110; EB-2016-0160, Transcript Volume 4, dated November 29, 2016, 118-141; and EB-2016-0160, Transcript Volume 7, dated December 5, 2016, 146-187.

³ EB-2016-0160, Procedural Order No. 4, dated October 28, 2016 [PO4].

19(2), 19(6), 20, 21, and 78(3) of the *Ontario Energy Board Act*⁴ (**OEB Act**) and the Board's own defined procedures for this Application; and

- (b) constitutes a breach of its duty of procedural fairness to Anwaatin, resulting in an error of law by variously:
- i. failing to decide upon, and provide any reasons for, on the Anwaatin Reliability Evidence and Anwaatin Requested Relief that was squarely before the Board;
 - ii. effectively depriving Anwaatin of its statutory right of appeal and/or judicial review by failing to provide any mention of the Anwaatin Reliability Evidence; and
 - iii. providing no justification, transparency, or intelligibility upon which to conclude that the Decision on the Anwaatin Reliability Evidence is either reasonable, correct, or otherwise falling within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

PART 2 – FACTS

9. Hydro One applied for 2017 and 2018 Uniform Transmission Rates pursuant to section 78(3) of the OEB Act. The Application was required to include evidence on reliability, customer needs, a transmission system plan (**TSP**) and related capital expenditures.⁵
10. Anwaatin applied for and was granted full intervenor status by the Board with all incumbent procedural rights and obligations.⁶

⁴ SO 1998, c 15, Sched B [**OEB Act**].

⁵ Ontario Energy Board, Filing Requirements for Electricity Transmission Applications, Chapter 2, dated February 11, 2016 [**Filing Requirements**].

⁶ PO1.

11. Anwaatin participated actively in the Application in accordance with the Board's six procedural orders. It filed extensive written interrogatories focussed primarily on electricity reliability in the Anwaatin First Nations Communities and the connecting transmission lines. Specifically, Anwaatin requested and received evidence from Hydro One that:
- (a) the frequency of momentary interruptions, frequency of sustained interruptions, overall frequency of interruptions, duration of sustained interruptions, delivery point unreliability, delivery point unreliability, customer delivery point performance outliers, and customer delivery point standards for the Anwaatin First Nations Communities were up to 20 times worse than: (i) the Hydro One service territory average and (ii) other northern and remote communities.
 - (b) transmission system reliability trends for the last 10 years are generally getting worse in the Anwaatin First Nations Communities;
 - (c) there is an annual backlog of preventative maintenance for transmission lines in the Anwaatin First Nations Communities;
 - (d) there are a number of transmission assets in sub-optimal condition in the Anwaatin First Nations Communities; and
 - (e) many of Hydro One's transmission assets in or serving the Anwaatin First Nations Communities are beyond their useful life, their planned replacement date and their anticipated replacement date.
12. Anwaatin also requested and was granted leave of the Board to file written consultant evidence, and First Nations community video evidence, focussed on the matters including, without limitation, the impact of Hydro One's poor reliability on the Anwaatin First Nations Communities.

13. Anwaatin's Reliability Impact Evidence showed that the very frequent and long electricity outages in the Anwaatin First Nations Communities resulted in:
- (a) full loss of most refrigerated foods;
 - (b) 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;
 - (c) lost hunting and harvesting time as a result of the necessity of dealing with the prolonged outage, and the need to find ways to replace lost meat, fish, and game birds with new protein sources through additional hunting and harvesting;
 - (d) loss of significant quantities of frozen blueberries used for sustenance as well as for cash sales to supplement family incomes;
 - (e) significant time needed to engage in the traditional practice of honouring the bodies of harvested animals whose meat is spoiled and wasted by taking the harvested animal parts that spoiled during the long outage to the bush to be buried and honoured with tobacco;
 - (f) increased sightings of, and dangers from, bears foraging at landfills for spoiled meats that are not subject to traditional methods of disposition;
 - (g) financial challenges for families with elders and caregivers who rely on traditional food sources to nourish their families with traditional meals, but who were forced to replace traditional food sources with store-bought foods, and use very limited household incomes to purchase food instead of paying for other family necessities; and

- (h) additional financial expenditures in Aroland First Nation, community and band council planning to identify a source of funds for building a community freezer with a back-up generator to provide elders and caregivers with assurance that harvested foods will be protected from substandard transmission performance.⁷
14. Further, on November 25, November 29, and December 5, 2016, Anwaatin cross examined Hydro One witnesses including Ms. Cheung, Mr. Penstone, Mr. Vels, Mr. Hubert, Ms. Guiry, Mr. Griffin, Mr. Henderson, Mr. Young, Mr. Mancherjee, and Mr. McLachlan at length on transmission system reliability disparity in the Anwaatin First Nations Communities. All of these Hydro One witnesses provided testimony and evidence that generally further substantiated the significant reliability disparity in the Anwaatin First Nation Communities.
15. Anwaatin also filed final argument that emphasized the Anwaatin Reliability Evidence and the critical nature of reliable electricity in the traditional First Nations context. Anwaatin's final argument included the Anwaatin Requested Relief, with an expectation that the Board would consider and address it in its Decision.
16. Moreover, Board Staff, in their final argument, supported the need to address the Anwaatin Reliability Disparity Evidence and supported the Anwaatin Requested Relief, stating:

The quality of electricity service to First Nations, and the needs of those customers, has come under increasing scrutiny in this hearing with the participation of, and evidence presented by, the Anwaatin First Nations.⁸

[...]

Staff also submits, in light of the evidence provided by Anwaatin, that Hydro One place additional emphasis on elevating the Tier 2 and 3 metrics concerning interruption frequency in the single circuit system, to their Tier 1 scorecard

⁷ EB-2016-0160, Anwaatin Evidence dated November 9, 2016, at 10-11.

⁸ EB-2016-0160, OEB Staff Submission dated January 25, 2017, at 13 [**OEB Staff Submission**].

to directly reflect the different reliability records of these two systems.⁹

17. Nonetheless, the 120-page Decision does not include a single word on the Anwaatin Reliability Evidence¹⁰ or the Anwaatin Requested Relief.
18. Anwaatin issued its Notice of its Motion to review and vary the Decision (the **Motion**) on October 18, 2017, and the Board has determined that the Motion passes the threshold test set out in Rule 43 of the Board's Rules of Practice and Procedure.¹¹

PART 3 – ISSUES AND ARGUMENT

19. The issues to be considered on this Motion and Anwaatin's respective arguments are organized as follows:
 - (a) Does the Decision on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief discharge the Board's statutory mandate and comply with Board-defined procedures in this Application?
 - (b) Does the Decision on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief constitute a breach of its duty of procedural fairness to Anwaatin and result in an error of law?
- I. **Does the Decision on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief discharge the Board's statutory mandate and comply with Board-defined procedures in this Application?**
20. The Board's hearing and Decision on Hydro One's transmission rate Application was required and undertaken pursuant to its statutory objectives and mandate under the OEB

⁹ OEB Staff Submission at 22.

¹⁰ We note that the Decision does briefly address an unrelated duty to consult / consultation issue that Anwaatin raised that is not within the scope of this Motion.

¹¹ EB-2017-0335, Procedural Order No. 1, dated December 19, 2017, at 3.

Act. The relevant provisions include, without limitation, sections 78(1), 78(3), 1(1)(1), 1(1)(2), 19(1), 19(2), 19(6), 20, and 21 of the OEB Act.

21. Specifically, s. 78(1) of the OEB Act prohibits Hydro One from charging for transmission without an order of the Board setting *just and reasonable* transmission rates under s. 78(3). The Board has the authority to determine all questions of fact and law within its jurisdiction in making that order,¹² and is required to make all such decisions by way of an order.¹³ In fact, the Board has the exclusive jurisdiction in respect of all matters that it has jurisdiction over.¹⁴
22. Hydro One therefore was required to obtain a transmission rate order from the Board through the Application, and Anwaatin was similarly required to have the Board address its issues associated with Hydro One's transmission reliability and related rates through the Application.
23. When the Board exercises its exclusive and mandatory powers to set transmission rates, the OEB Act also provides that the Board's powers and procedures apply to all matters before it¹⁵ and that the Board may give directions and require the preparation of evidence incidental to its power.¹⁶
24. The Board has exercised these powers and set general procedures relating to electricity transmission through its *Transmission System Code (TSC)* and the *Filing Requirements for Electricity Transmission Applications (Filing Requirements)*. Both the TSC and the Filing Requirements support consideration of the Anwaatin Reliability Evidence by requiring a

¹² OEB Act, s. 19(1).

¹³ OEB Act, s. 19(2).

¹⁴ OEB Act, s. 19(6).

¹⁵ OEB Act, s. 20.

¹⁶ OEB Act, s. 21.

thorough consideration of reliability, system performance, outages, and specific customer needs with respect to same.¹⁷

25. It was therefore reasonable and legitimate for Anwaatin to expect that its issues related to reliability and outages, and the Anwaatin First Nations Communities' needs, to be actively considered and determined by the Board in the context of the Application. Anwaatin's legitimate expectation that the Anwaatin Reliability Evidence and the Anwaatin Requested Relief would be heard and decided upon are further heightened by the specific procedural decisions made by the Board in the context of the Application.
26. The Board exercised its specific procedural decision-making powers under sections 19 and 20 of the OEB Act and the Board's Rules of Practice and Procedure, and issued six (6) detailed procedural orders during the course of the Application. The Procedural Orders, among other things, granted Anwaatin full intervenor status, with all incumbent and broad-reaching procedural rights, and allowed Anwaatin and one other intervenor (Environmental Defense) to draft and adduce evidence for full examination.
27. Anwaatin provided, and was examined on, its Reliability Disparity and Reliability Impact Evidence. On the basis of that evidence, Anwaatin set out the Anwaatin Requested Relief and legitimately expected the Board to decide upon, and give reasons for, its Decision in accordance with the Board's statutory mandate and sections 78(3), 19, 20, and 21 of the OEB Act.
28. The Board does not, however, appear to have considered and/or decided upon the Anwaatin Reliability Evidence or Anwaatin Requested Relief, both of which were material and relevant to setting "just and reasonable" rates in the Decision. There is, in fact, no

¹⁷ Filing Requirements, ss. 2.3.2 and 2.6.2.

mention of the Anwaatin Reliability Evidence, which the Board expressly authorized and approved. Nor did the Board provide any written reasons or other reasonable basis upon which to conclude that it considered the Anwaatin Reliability Evidence when making the Decision.

29. It is noteworthy that Environmental Defence, the other intervenor who adduced evidence in accordance with the Board's approval, had its issues considered and decided upon, with reasons, in the Decision.¹⁸
30. Further, Anwaatin legitimately expected the Board to act in a manner that is consistent with its specific customer- and reliability-focussed statutory objectives.
31. Section 1 of the OEB Act requires the Board to carry out its responsibilities relating to electricity with the objective to "*protect the interests of consumers with respect to prices and the **adequacy, reliability and quality** of electricity service*"¹⁹ and "*promote economic efficiency and cost effectiveness in the ... transmission ... of electricity*".²⁰ This customer- and Indigenous community-focussed approach to its mandate has also recently been confirmed by the Board in its *Strategic Blueprint: Keeping Pace With and Evolving Energy Sector* (the **Strategic Blueprint**).²¹
32. The Anwaatin Reliability Evidence clearly showed that electricity reliability in the Anwaatin First Nations Communities was more than 20 times worse than the Ontario average reliability and 4 times worse than the Northern and remote community average.²² Anwaatin

¹⁸ Decision at 32-33.

¹⁹ OEB Act, s. 1(1)(1).

²⁰ OEB Act, s. 1(1)(2).

²¹ Ontario Energy Board, *Strategic Blueprint: Keeping Pace With an Evolving Energy Sector, 2017-2022*, at 14.

²² EB-2016-0160, Hearing Transcripts, Volume 7, 155:22-156:106, 160:26-161:146, 162:9-20, and 162:21-28.

is of the view that this is the worst disparity in electricity reliability that has come before the Board in a transmission rate case.²³

33. The Anwaatin Reliability Impact Evidence also set out the many and unique impacts that poor electricity reliability has on the Anwaatin First Nations Communities and it was uncontroverted in this respect.
34. The Anwaatin Reliability Evidence and Anwaatin Requested Relief were expressly intended to address and protect the currently compromised interests of the Anwaatin First Nations consumers with respect to the adequacy, reliability and quality of electricity service. The Board's failure to consider and decide upon the Anwaatin Reliability Evidence and the Anwaatin Requested Relief therefore appears to be entirely inconsistent with the Board's objectives as set in s. 1(1) of the OEB Act and its recent Strategic Blueprint. It also appears to be in breach of the requirement to set just and reasonable rates under s. 78(3) of the OEB Act and the Board's own procedures in the Application.
35. In light of the foregoing, Anwaatin respectfully submits that the Decision on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief failed to discharge the Board's statutory mandate and comply with Board-defined procedures in the Application. The Board's failure to consider the Anwaatin Reliability Evidence and address the Anwaatin Requested Relief in the Decision constitutes error of law, which should be reviewed and varied by the Board on this Motion.

²³ Following counsel's limited and targeted review of the Board's transmission decisions.

II. Does the Decision on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief constitute a breach of the Board's duty of procedural fairness to Anwaatin and result in an error of law?

36. Anwaatin respectfully submits that the Decision, or lack of decision, on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief also constitutes a breach of the Board's duty of procedural fairness to Anwaatin and an error of law by:

- (a) failing to decide upon, and provide any reasons for, the Anwaatin Reliability Evidence and Anwaatin Requested Relief that was squarely before the Board in the context of Issues 4, 5, and 7 in the Application;
- (b) effectively depriving Anwaatin of its statutory right of appeal under s. 33 of the OEB Act and/or judicial review by failing to provide any mention of the Anwaatin Reliability Evidence; and
- (c) providing no justification, transparency, or intelligibility upon which to conclude that the Decision on the Anwaatin Reliability Evidence is either reasonable, correct, or otherwise falling within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

37. The Supreme Court of Canada has found that:

- (a) procedural fairness is a cornerstone of Canadian administrative law that requires public decision makers to act fairly in coming to decisions that affect the rights, privileges and interests of individuals, and the specific requirements are to be determined in the context of each specific case;²⁴

²⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

- (b) in certain circumstances, similar to those before the Board in the Application, the duty of procedural fairness will include the requirement for the tribunal to provide reasons for its decision;²⁵
- (c) the reasonableness of a decision is contingent on the existence of “justification, transparency, and intelligibility within the decision making process” and whether the decision falls within a range of possible acceptable outcomes, which are defensible in respect of the facts and law (the **Dunsmuir Test**);²⁶ and
- (d) the reasons must make it clear that a decision-maker considered a party's submissions and must provide some basis for understanding why those submissions were rejected.²⁷ A decision must make it clear that the decision-maker considered the relevant facts and reached a defensible conclusion based on those facts.²⁸
- (e) While the reasons are not required to include every argument, statutory provision, detail and finding on each constituent element of its final conclusion, the reasons must allow a reviewing court to satisfy itself that the tribunal grappled with the issue, understand why the decision was made, and determine whether the decision was within the range of acceptable outcomes.²⁹
- (f) A breach of procedural fairness is an error of law, and where there are no reasons in the circumstances where they are required, there is nothing to review. The reasons

²⁵ *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, at para 43.

²⁶ *Dunsmuir* at para 47.

²⁷ *United States v Lake*, 2008 SCC 23 [*Lake*], at para 46: “The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected.”

²⁸ *Lake* at para 41.

²⁹ *N.L.N.U. v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 [*NLNU*], at paras 9, 11, 13, and 14.

must show that the decision-maker was alive to the question at issue and came to a result that was within the range of reasonable outcomes.³⁰

38. The Newfoundland and Ontario Courts of Appeal have further elaborated on the Dunsmuir Test and the duty to give reasons finding that:

- (a) a decision that is unresponsive to the case presented does not meet the Dunsmuir Test, and essential submissions that are made should not be ignored. If they are regarded by the tribunal as frivolous or irrelevant to the issues in dispute, the tribunal should say so. If they are not, but rather, are simply unpersuasive, the tribunal should be expected to give at least a rational reason for why they are not persuasive. Such a requirement is inherent in the Dunsmuir focus on "the process of articulating reasons" to see if the result is supported by a chain of reasoning that is reasonable;³¹ and
- (b) in the rare instances where a tribunal with an obligation to give reasons has obligation to do so, and has offered nothing to support its decision, the tribunal fails to comply with its legal obligation to give reasons.³²

39. Anwaatin respectfully submits that, in the context of the Application, the Anwaatin Reliability Evidence, the Anwaatin Requested Relief, and the Decision:

- (a) Procedural fairness is a cornerstone of OEB laws, procedures and related rate making that affects individual customers and communities like the Anwaatin First Nations Communities. It requires the OEB to act fairly in coming to decisions that affect the

³⁰ *NLNU* at paras 22, 26.

³¹ *Burke v N.A.P.E.*, 2010 NLCA 12 [*Burke*], at para 67.

³² *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 [*Clifford*], at paras 25 and 26.

rights, privileges and interests of the individual customers that it is charged with protecting. The specific requirements of procedural fairness in the context of the Hydro One Application were extensive and required the Board to, among other things, allow for the Anwaatin Reliability Evidence to be produced and examined, and issue a written 120-page Decision with reasons.³³

- (b) The Board had a duty to treat Anwaatin fairly by: (i) considering the Anwaatin Reliability Disparity Evidence and the Anwaatin Reliability Impact Evidence that the Board had sanctioned in reaching the Decision; and (ii) giving reasons for the Decision on the Anwaatin Requested Relief that did not result in unfairness and prejudice to Anwaatin's right to be heard, in accordance with the principles of natural justice and *audi alteram partem*.
- (c) The Anwaatin Reliability Evidence shows that the interests of the individual Anwaatin First Nations Community members have been, and continue to be, negatively affected by the extremely poor reliability of the transmission service that they receive through three main lines. Although Anwaatin had the right to adduce and be examined on evidence, the Decision provides no reasons whatsoever or other indication that the Anwaatin Reliability Evidence was considered in the Board's decisions on the TSP and the Hydro One's approved capital envelope.
- (d) In the circumstances before the Board in the Application, the duty of procedural fairness therefore required the Board to consider, decide upon, and provide related reasons on the Anwaatin Reliability Evidence and the Anwaatin Requested Relief, in the Decision.³⁴

³³ *Dunsmuir* at para 79.

³⁴ *Baker* at para 43.

- (e) There is no justification and transparency, whatsoever relating to the Anwaatin Reliability Evidence and Anwaatin Requested Relief. There is therefore no way to determine whether the Decision on the Anwaatin reliability issues falls within a range of possible acceptable outcomes that are defensible in respect of the facts and law and otherwise meets the *Dunsmuir* Test;³⁵
- (f) The complete absence of reasons in the Decision on the Anwaatin Reliability Evidence and Anwaatin Requested Relief, appears to indicate that the Board did not consider Anwaatin's and Board Staff's submissions on the very poor electricity reliability in Indigenous communities.³⁶ It is not clear that the OEB considered and or "grappled" with the relevant Anwaatin Reliability Evidence and reached a defensible conclusion based on the facts contained therein and the Anwaatin Requested Relief.³⁷
- (g) The Anwaatin Reliability Evidence and Anwaatin Requested Relief were neither minor issues or details in the context of the Decision, and the Board's own procedures found that they were significant enough to warrant separate evidence and related procedures. The Board's complete lack of decision-making or reasons on the Anwaatin Reliability Evidence and Anwaatin Requested Relief would not currently allow a reviewing court to satisfy itself that the OEB grappled with the Anwaatin reliability issue, understand why no Decision was made on the issues by the OEB, and whether the non-decision was within the range of acceptable outcomes.³⁸ The complete lack of reasons on the Anwaatin Reliability Evidence appear to indicate that

³⁵ *Dunsmuir* at para 47.

³⁶ *Lake* at para 46.

³⁷ *Lake* at para 41.

³⁸ *NLNU* at paras 9, 11, 13, and 14.

the Board was unresponsive or “not alive to” the Anwaatin reliability question at issue and did not come to a result that was within the range of reasonable outcomes.³⁹

40. The Board therefore breached its duty of procedural fairness to Anwaatin and thereby committed an error of law.

PART 4 – RELIEF REQUESTED

41. Anwaatin respectfully requests that the Board review and vary the Decision to:

- (a) consider, decide upon, and provide reasons for, the material and adverse reliability issues set out in the Anwaatin Reliability Evidence that were raised by Anwaatin in the Application including:
 - i. the Anwaatin and Hydro One reliability disparity evidence showing that reliability in the Anwaatin First Nations Communities is 2081% (20.81 times) worse than the Ontario average and approximately four (4) times worse than reliability in Northern Ontario;
 - ii. the Anwaatin band council video evidence and Dr. Richardson's written and oral evidence on the significant, negative impacts of the poor and disparate transmission reliability on the Anwaatin First Nations Communities set out in the record and at Volume 13 of the EB-2016-0160 Hearing Transcripts; and
 - iii. Anwaatin and Board Staff final arguments; and
- (b) grant the Anwaatin Requested Relief and require Hydro One to apply its approved 2017/2018 capital budget envelope to promptly address and remedy the outdated

³⁹ *NLNU* at paras 22 and 26.

A4L, T7M, and M9K outlier transmission assets, which are the cause of the extremely poor and disparate electricity transmission system reliability in the Anwaatin First Nations Communities;

- (c) award Anwaatin its costs of this Motion; and
- (d) such other relief that counsel may advise and the Board may approve.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 15TH DAY OF JANUARY, 2018**



Lisa (Elisabeth) DeMarco
DeMarco Allan LLP



Cary Ferguson
DeMarco Allan LLP

COUNSEL TO ANWAATIN INC.

SCHEDULE A
DECISIONS

- 1 *Dunsmuir v New Brunswick*, 2008 SCC 9
- 2 *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817
- 3 *United States v Lake*, 2008 SCC 23
- 4 *N.L.N.U. v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62
- 5 *Burke v N.A.P.E.*, 2010 NLCA 12
- 6 *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670

SCHEDULE B
LEGISLATION AND RULES

- 1 Ontario Energy Board, *Rules of Practice and Procedure*
- 2 *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B
- 3 Ontario Energy Board, Filing Requirements for Electricity Transmission Applications, Chapter 2, dated February 11, 2016

SCHEDULE C
OTHER AUTHORITY

- 1 Ontario Energy Board, *Strategic Blueprint: Keeping Pace With an Evolving Energy Sector, 2017-2022*