



Métis Nation of Ontario
Office of the President

March 23, 2018

Honourable Glenn Thibeault, Minister of Energy
Ontario Ministry of Energy
4th Floor, Hearst Block
900 Bay Street
Toronto ON M7A 2E1

Dear Minister Thibeault,

RE: Métis Nation of Ontario Concerns with Hydro One Network Inc.'s Lake Superior Link Project's Leave to Construct Application and Urgent Meeting Request

As the President of the Métis Nation of Ontario ("MNO"), I am writing to express the MNO's increasing and grave concerns about Hydro One Network Inc.'s ("HONI") unexpected leave to construct application for the Lake Superior Link Transmission Line Project (the "LSL") as an alternative to the East-West Tie Transmission Line Project (the "EWT"). It is our understanding that the LSL seeks to complete with, and ultimately supplant the EWT. Given the years of engagement between Nextbridge, as the designated transmitter for the EWT, and Indigenous communities and governments—including the MNO—this eleventh hour attempt by HONI to supplant the EWT is a significant concern.¹ Of far greater concern, however, is that the LSL leave to construct application is proceeding without any substantive engagement or discussions—by Ontario or HONI—with the Métis communities whose traditional territories will be traversed and impacted by the LSL.² This is unacceptable to the MNO.

Right now, the MNO is completely in the dark with respect to the LSL. The MNO does not know what Ontario and HONI are planning, either together or independently. The only information we have is what we are periodically receiving from the Ontario Energy Board ("OEB") regulatory process, which has often been delayed in its public release and does not explain how the LSL application will impact the Indigenous communities who have been diligently participating in

¹ Nextbridge's environmental assessment for the EWT—in which the MNO actively participated—is substantially completed (the "EWT EA").

² As set out in previous correspondence and submissions to the Crown, the MNO represents two rights-bearing Métis communities whose traditional territories will be traversed by the EWT and LSL that meet the legal test set out in *R v Powley*, 2003 SCC 43. These two Métis communities have established rights and other asserted claims and interests that will be impacted by either proposed transmission line.

and relying on the Crown-created processes that have been put into place to date in relation to the EWT. This is also unacceptable to the MNO.

In its leave to construct application, HONI states that it asked for direction from Ontario regarding consultation with Indigenous communities on the LSL in November of 2017.³ Four months have passed and no one from Ontario has picked up a phone, written to, met with, or, explained what is happening to the Métis communities the MNO represents. No one from Ontario has asked for or solicited the MNO's views or input on what this could mean for the project in relation to Crown consultation, Métis economic participation, the existing MNO-NextBridge relationship, or the trust that has been built in relation to the EWT. No one from Ontario appears to have thought through the potentially disastrous legal implications of allowing HONI to proceed further with what has to date been a unilateral approach on the LSL. In the age of reconciliation, does Ontario really think this is an acceptable way to proceed?

The honour of the Crown—as a constitutional duty—must inform Ontario's actions and decision-making, including whether to delegate procedural aspects of Crown consultation to HONI regarding the LSL.⁴ Ontario must engage with impacted Indigenous communities in order to understand our views and what we see as the potential legal consequences of proceeding without regard to Indigenous interests.⁵ Ontario has, to date, failed to do so. What is happening right now regarding the LSL is not honourable. Nor is it legally sound. While HONI may believe it can rely on a sharp reading of provincial legislation to attempt to secure what it wants, Ontario, acting on behalf of the Crown, cannot. The current situation has the potential to doom a desperately needed piece of transmission infrastructure to years of litigation because the Crown has not considered or even talked to the Indigenous communities that will be impacted. This is the antithesis of reconciliation.

For going on eight years now,⁶ the MNO has acted and relied on Ontario's commitments in laws,⁷ provincial policies,⁸ and the processes directed and delegated by Ontario to ensure

³ HONI Leave to Construct Application, EB-2017-0364, Exhibit H, Tab 1, Schedule 1, at 1.

⁴ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24; *R v Badger*, [1996] 1 SCR 771 at para 41; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 65; *Canada v Long Plain First Nation*, 2015 FCA 177 at para 108.

⁵ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 44; see also *Clyde River (Hamlet)*, 2017 SCC 40 at para 23.

⁶ In March 2011, the Minister of Energy asked the OEB to create a process for selecting the most qualified and cost-effective transmission company to develop the East-West Tie transmission line that connects Northeast and Northwest Ontario.

⁷ *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sched B, ss 1(1), 3, 5.

⁸ For example, see commitments in the Long-Term Energy Plans with respect to new transmission and Indigenous communities.

meaningful Métis engagement, consultation and economic participation in the EWT.⁹ The designated transmitter for the EWT (*i.e.*, NextBridge) has reached negotiated agreements with proximate Indigenous communities based on delegated authorizations from the Crown.¹⁰ Now, at the eleventh hour, HONI—which excluded Métis from any equity participation or meaningful economic participation in its previous EWT bid¹¹—seeks to ignore and overturn all of the work that has been done. This has left the MNO with the feeling that we are having the rug pulled out from under us for the benefit of HONI, in which Ontario has a unique ownership interest.

Given the lack of any substantive engagement, and the scant details we have on HONI’s intentions vis-à-vis the LSL and what Ontario, as the Crown, is planning to do, we are unable to understand or assess the implications of the LSL leave to construct application. As such, we are requesting a meeting with Ontario representatives as soon as possible to discuss our concerns. In anticipation of that meeting, we want to make the following points and ask the following questions:

- **A proponent—in particular one that is principally owned by a Crown actor—should not be developing a project without engaging potentially impacted Indigenous communities at the earliest stages.** Courts have repeatedly held that engagement and consultation on a potential project needs to occur at the earliest stages, not at the eleventh hour.¹² How long has HONI contemplated doing this alternative project? Did it make any Indigenous communities aware of its plans? If yes, why were the most proximate and impacted Indigenous communities, such as the two impacted Métis communities represented by the MNO, not engaged or made aware of these plans? Was Ontario—as HONI’s largest shareholder—aware of HONI’s plans? If so, since when?¹³

⁹ For example, see the OEB’s transmitter designation process, the Ontario-NextBridge memorandum of understanding on consultation, *etc.*

¹⁰ The agreements that have been come to—in reliance on express delegation the MOU between Ontario and NextBridge—are “not just commercial agreements” but implicate the honour of the Crown and its duty of fair dealing towards Indigenous peoples. (*Canada v Long Plain First Nation*, 2015 FCA 177 at paras 108, 112.)

¹¹ HONI’s application for designation was made by a partnership of HONI, Great Lakes Power Transmission EWT LP and Bamkushwada LP. In evaluating its bid, the OEB found that “[w]hile EWT LP’s plan is good for the six First Nation partners comprising BLP, there are more limited opportunities for other affected First Nations and Métis communities to participate in the various aspects of this project, and no opportunity for equity participation,” EB-2011-0140, OEB Phase 2 Decision and Order at 17.

¹² HONI has requested a scant 45 days to “explore and discuss various participation benefits with the impacted Indigenous Communities, including equity partnerships” and to negotiate “any necessary agreements with Indigenous Communities.” HONI Leave to Construct Application, EB-2017-0364, Exhibit B, Tab 1, Schedule 1, at 12. Furthermore, HONI’s planning consultation activities with respect to the new route and environmental assessment activities are only vaguely described.

¹³ For instance, HONI’s Leave to Construct Application states that it has been engaging with Ontario about its proposal to use NextBridge’s environmental assessment studies since late 2017 and also stated that it reached out to Ontario regarding identifying potentially effected Indigenous communities in November of 2017. EB-2017-0364, Exhibit B, Tab 7, Schedule 1, at 9, and Exhibit H, Tab 1, Schedule 1, at 1.

- HONI’s timelines for effective and meaningful consultation on the LSL are unrealistic and it cannot rely on the consultation that has been done on the EWT.** Unlike the transmitters who participated in the EWT designation process, HONI’s proposed consultation timelines have not been tested or scrutinized,¹⁴ and, therefore, cannot be relied upon to justify that any cost savings could be found through the LSL. The MNO believes the opposite would be the case if HONI was allowed to proceed with the LSL. The potential for litigation from the MNO and other Indigenous communities could significantly slow down the proposed LSL. This is particularly so given HONI’s history of exclusion of Métis communities from meaningful economic participation opportunities in the EWT, as seen in its previous—and failed—bid to be designated by the OEB. Moreover, HONI’s estimates are unrealistic in comparison with consultation timelines on other transmission line projects within Ontario and other jurisdictions. They also make a mockery of the meaningful consultation that has happened on the EWT over the last four years. This late filing disregards that “consultation is concerned with the ethic of ongoing relationships.”¹⁵ Presently, HONI has no relationship with in the MNO with respect to the LSL. This cannot be built overnight, and its approach to date has shown it is not committed to establishing a respectful relationship with the MNO regarding the LSL. Courts have rejected this type of ‘bait and switch’ approach to consultation; a change of proponent in relation to a project is not a “neutral” change and requires consultation to start again from the beginning.¹⁶
- HONI’s proposal to “utilize the EA-specific consultation work, already completed by NextBridge,” including “associated studies,” ignores the MNO’s legal rights.** HONI’s statements and assumptions in the LSL leave to construct application that it can simply use the “associated studies” undertaken by the MNO as a part of the EWT EA are legally unsound and do not appear to consider or appreciate that the information contained in traditional knowledge and land use studies completed by Indigenous communities—certainly those completed by the MNO—is owned by those communities.¹⁷ These studies have been shared confidentially with NextBridge and include defined conditions and terms of use that cannot be unilaterally rewritten by an OEB approval of the LSL or by a regulation

¹⁴ Note that HONI did participate in the designation process as part of a partnership with Great Lakes Power Transmission EWT LP and Bamkushwada LP, which had now been dissolved. HONI is the sole proponent of the proposed LSL. EB-2017-0364, Exhibit B, Tab 7, Schedule 1, at 5.

¹⁵ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38.

¹⁶ *Gitksan and other First Nations v British Columbia (Minister of Forests)*, 2002 BCSC 1701 at para 82.

¹⁷ HONI suggests that because the individual EA and associated studies will ultimately be paid for by Ontario ratepayers, it should be available for use by any transmitter whose leave to construct application is approved. HONI Leave to Construct Application, EB-2017-0364, Exhibit B, Tab 1, Schedule 1 at 10. This casual approach to traditional knowledge and land use information is not honourable nor respectful, and undercuts the relationship and trust building required for reconciliation.

issued by Ontario (as proposed by HONI).¹⁸ These studies cannot be used by HONI without the MNO's agreement and consent, and NextBridge cannot legally hand them over to HONI. Moreover, the MNO would not consent to the use of these studies by HONI because they were negotiated as a part of the relationship that was built with NextBridge in relation to the EWT and were based on assessing effects in relation to the EWT's proposed route—not the LSL route¹⁹ which will require new studies to be commissioned.

- HONI's proposed approach to Indigenous engagement and economic participation in the LSL is absurd and will lead to a breach of the honour of the Crown.** Over the last four years, the First Nations and Métis communities whose traditional territories will be traversed and directly impacted by the EWT have participated in good faith negotiations with NextBridge. This has resulted in distinctive, respectful and complicated negotiated agreements being reached with the most proximate First Nations (who are equity partners in the EWT with NextBridge) and the Métis communities represented by the MNO. Importantly, through collaboration and hard work, a unique economic participation solution has been found for the Métis communities represented by the MNO. HONI's engagement contemplates now bringing 88 First Nations together—in a location nowhere near the proposed transmission line—to develop an approach and get to new negotiated agreements in 45 days.²⁰ With respect, this proposed approach is absurd. It could potentially lead to the most proximate First Nation and Métis communities being left out in the cold because they already have negotiated agreements with NextBridge, while other Indigenous communities—that are nowhere near the proposed transmission line—may become partners or beneficiaries of negotiated agreements with HONI. How does this advance reconciliation? Ontario cannot sit back and allow this nonsensical process to proceed without intervention, let alone sanction it by delegating procedural aspects of consultation to HONI for the LSL. The agreements that have been negotiated by First Nations and Métis communities—based on their reliance on Ontario's commitments and the Crown's delegated authorizations to NextBridge—implicate the honour of the Crown.²¹ These cannot be cavalierly disregarded without legal consequences.

¹⁸ The MNO's "associated studies" ... "originate in confidence, through a relationship of trust between [the MNO] and its members ... confidentiality is essential to the maintenance of that relationship." This information must be protected from disclosure "in order to protect confidentiality and preserve the relationships necessary for consultation processes" (*Yahey v British Columbia*, 2018 BCSC 123 at paras 24, 26).

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²⁰ HONI Leave to Construct Application, EB-2017-0364, Exhibit B, Tab 1, Schedule 1, at 12.

²¹ See for example, *Canada v Long Plain First Nation*, 2015 FCA 177, paras 108, 112; *Bear v Saskatchewan (Government of)*, 2016 SKQB 73 at paras 37, 41.

Based on the above, the MNO is requesting a meeting—on an urgent basis—to discuss these issues. As set out above, this meeting must occur prior to Ontario signing a memorandum of understanding with HONI delegating procedural aspects of Crown consultation in relation to the LSL. Ontario needs to understand the MNO's perspectives on these issues as well as the potential implications of its actions, and the MNO needs to understand how and why the LSL application has come about, and how it might proceed. To not even engage with the MNO on this decision is not consistent with Ontario's duties and obligations owing to the MNO.

We look forward to hearing from you and scheduling a meeting as soon as possible to discuss these crucial issues. Please contact Aly Alibhai, Director of the Lands, Resources and Consultation Branch of the MNO at 416-977-9881 or alya@metisnation.org to do so.

Sincerely,



Margaret Froh
President
Métis Nation of Ontario

c.c. MNO Lakehead/Nipigon/Michipicoten Consultation Committee
MNO Historic Sault Ste. Marie Consultation Committee
Aly Alibhai, Director, Land, Resources and Consultation Branch, MNO
Jason Madden and Colin Salter, Pape Salter Teillet LLP
Jennifer Tidmarsh and Andy Hope, NextBridge Inc.
Kirstin Walli, Board Secretary, Ontario Energy Board