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B A R R I S T E R S A N D S O L I C I T O R S

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June 1st, 2018

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attn: Ms. Kirsten Walli
Board Secretary

Dear Ms Walli:

Re: NextBridge motion for the dismissal of Hydro One's Lake Superior Link Application
OEB File No. EB-2017-0364
Written Submission- BLP First Nations

Pursuant to the Ontario Energy Board ("OEB") Procedural Order No. 2 dated May 18, 2018, Bamkushwada Limited Partnership ("BLP") and the following First Nations: Pays Plat First Nation, Fort William First Nation, Red Rock Indian Band, Pic Mobert First Nation and Biigtigong Nishnaabeg (all five First Nations with BLP the "BLP First Nations") are filing their written submission to the OEB. A book of authorities is also being filed with this written submission.

Please contact the undersigned if you have any questions.

Yours truly,

Olthuis, Kleer, Townshend LLP

JULIE-ANNE PARISEAU FOR KATE KEMPTON

cc. Chief Patricia Tangie, Michipicoten First Nation
 Chief Michano, Biigtigong Nishnaabeg
 Chief Mushquash, Pays Plat First Nation
 Chief Collins, Fort William First Nation

Chief Desmoulin, Pic Mobert First Nation
Chief Wawia, Red Rock Indian Band
Oliver MacLaren, Olthuis Kleer Townshend LLP

ONTARIO ENERGY BOARD
EB-2017-0364

BAMKUSHWADA LIMITED PARTNERSHIP (“BLP”)
and
BIIGTIGONG NISHNAABEG
PAYS PLAT FIRST NATION
FORT WILLIAM FIRST NATION
PIC MOBERT FIRST NATION
RED ROCK INDIAN BAND
 (“Five First Nations”)
(BLP and the Five First Nations being “BLP First Nations”)

WRITTEN SUBMISSION
FROM
BLP First Nations

To:

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attn: Ms. Kirsten Walli
Board Secretary

Introduction

1. Hydro One Networks Inc. (“HONI”)’s application for Leave to construct (“LTC”) must be dismissed.
2. Under section 96(2) of the *Ontario Energy Board Act*, the Ontario Energy Board (“OEB”) at the LTC stage, must consider whether the HONI project (the “HONI Project”) is in the public interest by assessing the interests of consumers with respect to prices (and the reliability and quality of electrical services).
3. The Duty to Consult and Accommodate (“Duty”) Indigenous peoples will have to be fully met before any construction on the HONI line starts, and before any impacts on Indigenous peoples occur. This is a constitutional Duty that cannot be ignored. It trumps non-constitutional law.
4. While the OEB does not directly consider whether the Duty has been or will be met as part of the LTC decision, it does have to know that the Duty must be met before construction starts, and has to therefore account for delays and costs that will be required to meet it.
 - (a) The HONI Project already imposes a delay (of one year). But in order for the Duty to be met both before and after LTC is granted – and in all cases before construction actually starts – significantly more delay would be required, much greater than one year. Such delays will impose greater and greater costs on the BLP First Nations, that HONI will have to account for and make up. This will drive the cost of the HONI Project up a fair bit.
 - (b) At least three matters will require time to address in order to meet the Duty, and will thus cause delays (likely significant) beyond the short time frames proposed by HONI: (i) the Pukaskwa National Park (“Park”); (2) the Environmental Assessment (“EA”) and the First Nations’ contributions to it, of highly sensitive information; and (3) the economic accommodation/participation.
5. HONI says that the timing of the HONI Project is but one factor that the OEB has to consider at LTC; that costs are another factor. HONI then goes on to assert that the costs of the HONI Project are substantially lower than those of the Nextbridge project (of which BLP is a part). **This is not correct.**
 - (a) The delay of the HONI Project is likely not just one year. It will likely be several years. This is the likely time period required to have the Duty met.
 - (b) The costs may end up being higher, even a lot higher, than the Nextbridge project. Such costs will be caused by the delays, and by the harm to the BLP First Nations that such delays will impose.
6. Why will the requirement to meet the Duty require time (further delay) and costs for HONI? The Duty must always be carried out with the intent of *substantially addressing*

the concerns of the affected Indigenous peoples (ie: concerns about project impacts). To prove that such intent was operating, one has to show *that all good faith efforts* were made to substantially address those concerns, through provision of *adequate accommodation measures*. **That requires time. And it requires money. Both far more than HONI has allowed for in its LTC application.**

7. The Duty has both procedural and substantive elements.
 - (a) The procedural requirement is timing: that the Duty must be fulfilled – the consultation engagement completed and accommodation measures in place – before the project construction starts and impacts start. **Timing requirements here will yield a greater delay than one year.**
 - (b) The substantive requirement is results: to yield (or to make all good faith efforts to yield) accommodation measures sufficient to address the BLP First Nations' concerns. **Accommodation requirements here will yield much higher costs than HONI has accounted for.**
8. On the timing and delay: Time must be sufficient to fulfill the Duty. That means there needs to be time to:
 - (a) fully allow the BLP First Nations to understand the potential impacts of the HONI Project on them;
 - (b) allow HONI to fully understand the BLP First Nations' concerns about those impacts;
 - (c) allow HONI and the BLP First Nations to take all reasonable steps in good faith to substantially address those concerns through accommodation measures.¹
9. Time must be available before LTC is granted, in regard to the routing and design of the HONI Project – especially where the line location differs from the Nextbridge project, as in the Park. HONI cannot meet those requirements in the few short months before LTC would be granted. There are two Aboriginal title claims underway covering the Park area, and those two BLP First Nations do not agree that HONI may impact the Park any more than it already has. They say HONI needs their consent to do anything else. HONI does not appear to agree. This huge disagreement, and the impacts of the title claims processes, will take time to work through. Possibly years.
10. For all other matters, time has to be available after a conditional LTC is granted but before construction actually starts. The 12 or 14 month time period now estimated, is wholly inadequate for this purpose. There cannot be any engagement on any accommodation measures like economic returns or participation, in the time period prior to LTC. It would have to start afterward. There is an exclusivity contractual requirement

¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] at para 168; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*] at para 64.

that BLP First Nations are bound to with Nextbridge. Even if there weren't, the OEB cannot effectively compel the BLP First Nations to compete with themselves by entering into negotiations with a bidder for ownership in a project that is competing with the one they already own. To do so would cause the BLP First Nations harm in any future business or economic accommodation engagements. What companies are going to spend all the time and money entering into deals with these First Nations for projects in the future, when they could all be undone? Engagement between HONI and the BLP First Nations about economic accommodation cannot commence until the agreement with Nextbridge expires, and there is no longer any competition, which means after LTC is granted to HONI and Nextbridge is out.

11. Finally, the real possibility of legal challenges to any approvals issued to HONI that would or do breach the Duty, must be factored in. Resolving such challenges will cause delays, and costs.
12. On accommodation measures and costs: The real human and financial costs and losses that the BLP First Nations will suffer as the result of a one year delay are significant and would have to be made up. But the delay is likely to be years, and the costs to be made up thus exponentially larger.

1. How the Duty Applies in this Case

13. While the OEB might not be able to directly rule on whether the Duty was met at the LTC stage, it cannot:
 - (a) effectively *prevent* the Duty from being met; or
 - (b) fail to *account* for what the meeting of the Duty requires, as that affects the “interests of consumers in respect of price, reliability and quality.”

Because regardless of anything else, the Duty must be met fully before the first shovel digs into the ground to construct the project. This is the law. No Crown or statutory entity can avoid, shirk or breach this law.

14. The OEB's decision-making processes must be consistent with s. 35 of the *Canadian Constitution* and its purpose of advancing reconciliation.² Because the Duty is constitutional in nature, it lies “upstream” of any statutory regime and cannot be ousted by legislation.³ The OEB must do what the Duty requires to the extent that its statutory powers allow.⁴ That means in this case that the OEB must not prevent the Duty from

² *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 185; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] at paras 36-37; *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] at 1106; *Mikisew Cree* at para 1.

³ *Clyde River* at para 19; *Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario et al*, 2011 ONSC 7708 at para 41; *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 106.

⁴ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Carrier Sekani*] at para 61; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas of the Thames*] at para 32.

being met (by the Crown and the proponent), and must account for what meeting the Duty will require.

Cannot Prevent the Duty

15. The OEB cannot prevent the Duty from being met (including in later processes), by granting LTC at a time or in such a way that would render the Duty moot or meaningless afterward.
16. The Duty is the Crown's at law; in this case, the Crown has delegated it to the proponent (HONI).
17. The OEB must not render its decision on LTC until *after the Duty has been met in respect of the routing and design*. LTC is focussed on these core aspects of a project – routing and design. Costs and timing of a project are grounded in the route and design. Major routing and design aspects cannot readily be changed after LTC – and if they are, this would change the very basis on which LTC was initially granted, and require a new or amended LTC application process.⁵
18. The LTC decision effectively locks in route and design – things that future decisions (such as the EA) cannot undo or fix. The Duty must be met before LTC, in respect of route and design. HONI agrees with this.⁶
19. The Duty must commence at the earliest possible planning stages for a project, and must be completed *before* final decisions about a matter are made, for example:
 - (a) before the transfer of ownership or control of tree farm licences;⁷
 - (b) before the sale or sub-leasing of lands subject to a claim;⁸
 - (c) before a change in a regulatory regime applicable on privately owned lands;⁹ and
 - (d) before making an agreement to purchase electricity from a hydro-electricity project.¹⁰
20. Not all of the Duty in respect of the project has to be met before and as a condition of granting LTC. Some consultation and accommodation on some other aspects of the project can be completed later, such as during the EA and as a condition of the EA approval. More detailed environmental management issues about the line, and

⁵ *Union Gas Ltd and Quaggyotto et al*, (1974), 1 OR (2d) 751 (CA); *Hydro One Networks Inc (Re)*, 2010 LNOEOB 365 at paras 26-27.

⁶ See the testimony of Ms. Croll, p. 101, lines 1-12 of the Transcript from May 17, 2018 Technical Conference.

⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at paras 35, 46-47.

⁸ *Musqueam Indian Band et al v City of Richmond et al*, 2005 BCSC 1069 at paras 114 and 116.

⁹ *Hupacasath First Nation v British Columbia (Minister of Forests) et al*, 2005 BCSC 1712 at paras 201-233.

¹⁰ Although the Court found that in that case, the agreement would not adversely affect Aboriginal rights, it held that the agreement was "Crown conduct": *Carrier Sekani* at para 81.

compensatory accommodation measures (economic participation) are types of consultation and accommodation that can occur after LTC is granted. Note that the issuance of LTC would have to be conditional on the Duty being met in regard to these, and in fact, all, issues, pertaining to the project.

21. But as stated, the Duty about the route and core design, must be completed before the granting of LTC. To lock in the route and core design is to foreclose a change to the route. A route change is a form of accommodation measure. Accommodation measures cannot be foreclosed unless the Duty has been met about that issue (i.e. route). It is not possible to consult about a *fait accompli*.
22. If the Duty does not allow meaningful change to be made in the decision at the conclusion of the process, so-called consultation will be nothing more than inviting Indigenous peoples to “blow off steam.”¹¹ To fulfill the Duty, the process cannot foreclose accommodation from the outset.¹² Where accommodation is foreclosed from the beginning, it is open to infer that meaningful consultation did not occur and that the Crown is not negotiating in good faith. If a decision-making process leaves few if any meaningful choices in which the First Nation can be accommodated, such that the final decision is mere rubber stamping of earlier steps, this will render the Duty meaningless, and breached.¹³

Must Factor in What Duty Requires

23. The OEB cannot ignore the Duty and its effect on prices, or costs, of the project. The OEB can and must consider at LTC the “interests of consumers with respect to prices.” It must consider how the Duty must be met in this case, and how the meeting of that Duty will impact such costs. This is as much a relevant factor in the costs of the project as anything else, such as design of towers or routing of the line.
24. The OEB must factor in all relevant matters when it assesses prices, or costs. No decision-maker may fail to consider relevant factors, but must “be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.”¹⁴ In this particular case, the OEB knows that the Duty applies and must be met, and that accommodation measures are to include economic participation, since the Crown gave Aboriginal consultation and economic participation high priority at the beginning of this entire new process – the designation stage – in the letter from the Minister of Energy

¹¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at para 46; *Mikisew Cree* at para 54.

¹² *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139 at para 243.

¹³ Jack Woodward, *Native Law*, Vol 1 (looseleaf 2018, release 1), ch 5 at 88.2-88.3; *Musqueam Indian Band v British Columbia*, 2005 BCCA 128 at para 95; *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at para 74; *Sambaa K'e Dene Band v Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204 at para 165.

¹⁴ *Oakwood Development Ltd v St-François Xavier*, [1985] 2 SCR 164 at para 16; *Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at para 70.

(“MOE”) to the OEB dated March 29, 2011, which the OEB incorporated into its filing requirements.¹⁵ Even had the MOE not explicitly required consultation and economic participation to be factors in this process, the Duty always applies anyway.

25. The OEB’s LTC decision would be judicially reviewable as unreasonable if it granted a LTC approval when it knew or ought to have known that delays and costs were likely to escalate as a result of the Duty having to be met prior to construction starting, and not taking these fully into account.

2. HONI’s LTC Application and Applying the Duty to it: Delays and Costs

a. Fulfilling the Duty will delay the HONI LSL Project

26. There must be sufficient time for consultation to be meaningful, as opposed to a “box checking” exercise:

The Crown must give the aboriginal group a reasonable amount of time to respond to a referral and engage in consultation. The Crown must be prepared to let consultation run its course; it cannot abort the consultation process because of other time pressures where the aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions.

...

A reasonable consultation period is required to give aboriginal groups time to consider the proposed decision, gather any internal information, and seek any outside advice on technical issues. A reasonable time period must also take into account the volume of referrals that the aboriginal group is handling (which in some cases is extremely high) as well as its capacity level (in many cases, there is no person designated to handle referrals due to the group’s inability to fund such a position).¹⁶

27. It has taken Nextbridge five years to consult and accommodate the BLP First Nations for the EWT Project.¹⁷

¹⁵ Letter from the MOE to the OEB dated March 29, 2011 filed as Exhibit D of Chief Collins’ Affidavit filed in the file EB-2017-0364 on May 7, 2018; OEB, “Filing Requirements for Designation Applications,” Appendix A to Phase 1 Decision and Order, ss 3, 10 (2-3, 13-14).

¹⁶ Jack Woodward, *Native Law*, Vol 1 (looseleaf updated 2017, release 4), ch 5 at 97 [footnotes omitted]; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 at para 214; *Dene Tha’ First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 116, aff’d *Canada (Minister of Environment) v Imperial Oil Resources Ventures Ltd*, 2008 FCA 20; *Tsilhqot’in v British Columbia*, 2007 BCSC 1700 at para 1138; *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 238 at para 293.

¹⁷ See paras 15 and 19 of the Affidavit from Chief Collins, para 9 of the Affidavit from Chief Desmoulin, and para 10 of the Affidavit from Chief Michano filed in the file EB-2017-0364 on May 7, 2018.

28. It took HONI and GLPT about three years of engagement just to come up with an outline agreement on how ownership would work, as part of the designation application.¹⁸
29. It is an insult to the BLP FNs and the Constitution of Canada (where the Duty arises) to propose as HONI is doing, that the Duty can be met in such unreasonably short time frames. If the OEB were to issue LTC to HONI, such that adequate time and effort was effectively not provided to fulfill the Duty, then these proposed time frames would be imposed on the BLP First Nations. And this would be a breach of the Duty. Time to consult and accommodate about the route and design has to be adequate to fulfill the Duty before LTC; and time to consult and accommodate about everything else has to be adequate to fulfill the Duty after LTC and before construction starts.
30. Consultation requires the time, attention and human capital of First Nation leaders and their designates. A proponent or the Crown cannot create such a short time frame to begin with and then effectively compel the First Nations to drop everything else to meet it. That is not good faith. That is not procedurally fair. HONI acknowledges that lack of capacity is an issue for First Nations.¹⁹ HONI acknowledges that First Nations are often overwhelmed with information notices and other requests for consultation.²⁰ Yet these capacity problems cannot be fixed purely by throwing money at the situation. Time to enable the overworked leadership and their designates to participate – has to also be provided. First Nations should not be made to jump just because a proponent snaps its fingers.
31. The BLP First Nations informed HONI of this stress on their time and attention and resources.²¹
32. Consultations between HONI and the BLP First Nations have not commenced. HONI met with BLP First Nations on April 6, 2018 to deliver a presentation of the HONI Project.²² This meeting was to discuss HONI's need to start consultation but was not consultation itself.
33. HONI acknowledges the importance of building trust as a key aspect of consultations.²³ HONI admits that the relationship now between HONI and the BLP First Nations, about this project, is "bad".²⁴ HONI refused to abandon this LTC application when asked directly on behalf of the BLP First Nations, if it would. It intends to proceed over the objections of the BLP First Nations. This is despite stating on the record at the

¹⁸ See Exhibit KT2.1 submitted by Nextbridge at the Technical Conference on May 17, 2018. See lines 27-37, p. 12 of 74 of Exhibit KT2.1 and p.55-56 of the Transcript from May 17, 2018 Technical Conference.

¹⁹ See the testimony of Ms. Goulais at p.238, line 16-28 and p. 239, lines 1-15 of the Transcript from May 17, 2018 Technical Conference.

²⁰ *Ibid.*

²¹ See EB-2017-0364, LSL Motion Additional Evidence, Attachment 13, p. 2 of 3.

²² Introduction & Summary, Lake Superior Link Project - Additional Evidence at p.12.

²³ See Exhibit KT2.2 submitted by Nextbridge at the Technical Conference on May 17, 2018. See p. 13 and 14 of 122 of Exhibit KT2.2 and the testimony of Ms. Goulais at p.58-60 of the Transcript from May 17, 2018 Technical Conference.

²⁴ See lines 14-19, p. 113 of the Transcript from May 17, 2018 Technical Conference

designation hearing that it understands the value of the “social licence,”²⁵ which it admits includes First Nation approval.²⁶ The BLP First Nations cannot now trust HONI’s commitments at all. Given the damage to the relationship between HONI and the BLP First Nations, about this project, one has to question whether trust could be rebuilt and if so how long it would take. Certainly a long time. This will cause significant delays in the consultation engagement.

34. These delays would have to be allowed for – to the extent reasonable. The content of the Duty is assessed on the standard of reasonableness.²⁷
35. Given that HONI knew that the BLP First Nations had spent years working through all accommodation measures with Nextbridge, and that they include ownership of that project, HONI would be reasonably expected to know that undoing all of that – caused by a competitive bid being successful – would impose significant hardships on the First Nations - which it would.²⁸ Thus, allowing, in fact requiring, significant time and effort to build trust and relationship – let alone to try to accommodate for all the damage – would be more than reasonable.
36. There are at least three subject matters in this case that will cause significant time to be spent meeting the Duty, and thus cause significant delays:
 - (a) the Park;
 - (b) the EA, and the provision of the BLP First Nations’ information for it; and
 - (c) economic accommodation/participation.

The Park

37. The issue of the routing of the HONI line through the Park will take a lot of time and effort to resolve, or to make all good faith efforts to try to resolve which is the minimum of what the Duty requires.
38. HONI cannot piggyback on Nextbridge’s consultation with and accommodation of Indigenous peoples, or the EA, in respect of the Park.²⁹ HONI admits this.³⁰

²⁵ See Exhibit KT2.2 submitted by Nextbridge at the Technical Conference on May 17, 2018. See Executive summary at p. 2 and p. 39 of Exhibit KT2.2.

²⁶ See the testimony of Ms. Goulais from p.107-109 of the Transcript from May 17, 2018 Technical Conference. See also Ms. Goulais testimony at p. 58 of the Transcript from May 17, 2018 Technical Conference.

²⁷ *Haida Nation* at para 62.

²⁸ See paras 15, 19 and 34 of the Affidavit of Chief Collins and testimony of Chief Collins, p. 14, lines 12-20 and p. 23, lines 5-16 of the Transcript from May 16, 2018 Technical Conference; See para 10 of the Affidavit of Chief Michano; See para 9 of the Affidavit of Chief Desmoulins and testimony of Chief Desmoulins, p. 17, lines 1-28 and p. 18, lines 1-4 of the Transcript from May 16, 2018 Technical Conference

²⁹ See testimony from Mr. Evers of the Minister of the Environmental and Climate Change, p. 167, lines 18-25 of the Transcript from May 16, 2018 Technical Conference.

39. The routing of the line through the Park is hotly contested.
40. Two of the BLP First Nations – Pic Mobert First Nation and Biigtigong Nishnaabeg – are actively pursuing Aboriginal title claims in court, and the areas claimed overlap with the Park.³¹ Both say that HONI will require their consent before any further development may occur in the Park.³² HONI does not appear to agree with this.³³
41. Yet HONI acknowledges that when Aboriginal title claims exist and affect a development about which the Duty is owed, this can lead to serious delays to try to figure out if and how such development can occur so as to not render such title useless.³⁴
42. The Supreme Court of Canada goes even further. It says that in many cases there is a risk of proceeding on lands claimed for Aboriginal title, without the First Nations’ consent. If such a claim succeeds, the Crown runs the risk of having to cancel a project that it approved without the title-holder’s consent.³⁵ When a claim is particularly strong, such as shortly before a court declaration of title, the Crown must take steps to preserve the Aboriginal interest pending final resolution of the claim.³⁶
43. Strong Aboriginal title claims push the Duty to the high end of the spectrum. This means that the content of the Duty must be comprehensive and all possible efforts to resolve concerns must be made.³⁷ This takes time – a lot of time.
44. While HONI’s line through the Park might not *permanently* take up more than the current right of way, there will likely be impacts on other lands in the area at least during construction, that the two BLP First Nations do not consent to. The First Nations are concerned that there would have to be many “laydown areas” between the helicopters’ points of origin and the places on the right of way where work is occurring, both of which will be constantly moving.³⁸
45. Further, replacing older towers in the Park with newer bigger ones essentially guarantees that those towers and lines will be there for a longer period of time, keeping that right of way land unavailable to be returned to the First Nations as title land for a much longer period of time.

³⁰ See the testimony of Ms. Croll, p. 22, lines 27-28, p. 23, lines 1-12, p. 27, lines 15-23 and p. 28, lines 3-9 of the Transcript from May 17, 2018 Technical Conference. See also the testimony of Ms. Goulais, p. 93, lines 5-12 of the Transcript from May 17, 2018 Technical Conference.

³¹ See paras 4-9 of the Affidavit of Chief Desmoulin and paras 4-9 of the Affidavit of Chief Michano filed in the file EB-2017-0364 on May 7, 2018.

³² See para. 8 of the Affidavit of Chief Desmoulin and para. 9 of the Affidavit of Chief Michano filed in the file EB-2017-0364 on May 7, 2018.

³³ See the testimony of Ms. Goulais, p. 92-94 of the Transcript from May 17, 2018 Technical Conference.

³⁴ See Ms. Goulais’ testimony at p.100, lines 6-14 of the Transcript from May 17, 2018 Technical Conference.

³⁵ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in*] at para 92.

³⁶ *Tsilhqot’in* at para 91.

³⁷ *Haida Nation* at paras 44, 47.

³⁸ See the testimony of Chief Michano, p. 9, lines 2-10 of the Transcript from May 16, 2018 Technical Conference.

46. Further still, the construction via helicopter will cause significant impacts on the exercise of other rights of the BLP First Nations in the area. Ground disturbance, the presence of humans, noise of helicopters and construction, and air pollution would drive wildlife out of their regular habitats, potentially to places where harvesters can access them only with great difficulty or not at all.
47. All of this would have to be resolved, as a routing issue, prior to the LTC decision being made. This will take a long time – much longer than a few short months. It could well take several years. Even if this were left to be resolved later, the LTC would have to be conditional on the Duty being met later. Such Duty after LTC would also take a long time to be met. And again, the Park routing in no way overlaps with the Nextbridge line and in no way duplicates any of the consultation or accommodation that Nextbridge has already undertaken.
48. There is a significant risk that in carrying out the Duty, the two title-claiming BLP First Nations, and HONI, will reach an impasse on the routing of the line through the Park. This would then lead to one of three possible scenarios: 1) HONI goes back to the OEB seeking a re-routing of the line; 2) the First Nations launch a legal challenge if HONI intends to proceed with the line through the Park over their objections; or 3) the First Nations lie down and accept the imposition without a fight. The last scenario is not likely. The first two would both impose significant delays before construction was able to start.

The Environmental Assessment

49. As part of the EA, in accordance with best EA practices, BLP First Nations provided NextBridge with sensitive and confidential Traditional Ecological Knowledge ("TEK") and Traditional Land Use Study ("TLUS") information.
50. These studies contain very sensitive information which was given to Nextbridge under confidentiality agreements.³⁹ They were provided to their project partner, after years of trust had been built up.
51. The BLP First Nations who participated in these studies and provided the confidential information do not allow Nextbridge to release the information to HONI.⁴⁰ HONI will thus have to build such trust first with the BLP First Nations, and then if and when trust is built, to engage with them to undertake such TLUS and TEK studies unique to the HONI Project.
52. HONI acknowledges the importance of building trust as a key aspect of consultations.⁴¹ Without it, highly sensitive TLUS information will not likely be willingly disclosed.

³⁹ Affidavit from Chief Collins at paras 21 and 22 filed in the file EB-2017-0364 on May 7, 2018.

⁴⁰ Affidavit from Chief Collins, President of BLP and Chief of Fort William First Nation at paras 21, 22 filed in the file EB-2017-0364 on May 7, 2018.

⁴¹ See Exhibit KT2.2 submitted by Nextbridge at the Technical Conference on May 17, 2018. See p. 13 and 14 of 122 of Exhibit KT2.2 and p.58-60 of the Transcript from May 17, 2018 Technical Conference.

53. In order to build the requisite trust to acquire such culturally and spiritually sensitive information, and to undertake studies to acquire it, will require a fair bit of time, and cause delays in HONI's untenable projected schedule.

Economic Accommodation/Participation

54. HONI proposes to finalize economic participation agreements with all relevant Indigenous communities within 45 days of receiving LTC.⁴² This is not possible under any scenario.
55. It took three years for HONI, GLPT and BLP First Nations to reach an agreement that was more of an outline and did not comprise a partnership agreement. It took Nextbridge more time than that to reach full detailed agreements with BLP First Nations.
56. Engagement on this form of economic accommodation or participation, cannot even *commence* until after LTC is granted to HONI. At that time, and only at that time, would the exclusivity agreement between the BLP First Nations and Nextbridge expire.⁴³
57. As stated above, even if the exclusivity clause did not exist, the BLP First Nations could not be expected or compelled to compete with themselves. The BLP First Nations would compete with themselves by entering into negotiations with a bidder for ownership in a project that is competing with the one they are already own. To do so would cause the BLP First Nations harm in any future business or economic accommodation situations. What companies are going to spend all the time and money entering into deals with these First Nations, if the First Nations were known to have turned their backs on deals and companies to compete with them?
58. HONI knew or ought to have known of this reality and that it would likely be reflected in a contractual exclusivity clause – as it had been with HONI. A very similar exclusivity clause was part of the agreement between the BLP First Nations and HONI (and GLPT) – at the designation stage.
59. HONI thus would have, or ought to have, known that consultation or engagement about such economic accommodation and participation measures could not commence until after LTC.
60. The content of HONI's LTC application – that it intends to complete this engagement within 45 days after LTC, is far from credible. It could well take years to complete such an agreement between the BLP First Nations and HONI. HONI does not know what the economic participation agreements between the BLP First Nations and Nextbridge contain.⁴⁴ It does not know what it will be expected to “match”. Further, given the serious

⁴² HONI Lake Superior Link Project – Application and Evidence (February 15, 2018), Ex B, Tab 7, Schedule 1 at 7.

⁴³ Affidavit from Chief Collins at para.32 filed in the file EB-2017-0364 on May 7, 2018.

⁴⁴ See testimony of Ms. Goulais, p.103, lines 25-28 from May 17, 2018 Technical Conference.

harm that will be caused to the BLP First Nations by the delays of HONI's Project⁴⁵, it is reasonable to expect the BLP First Nations will expect HONI to do more than "match" what they have now. All of this will take a lot of time to resolve or to try to resolve through good faith efforts – which is the Duty requires.

b. Fulfilling the Duty will Increase the Cost of the HONI LSL Project

61. The substantive element of the Duty is addressing Indigenous peoples' concerns.⁴⁶ Concerns are addressed through accommodation measures. There are four types of accommodation measures:
- (a) Preventing impacts;
 - (b) Mitigating impacts that cannot be fully prevented;
 - (c) Compensation to offset residual impacts (i.e. bringing a negative to zero), and;
 - (d) Providing upside benefits (i.e. bringing zero to a positive) to reflect the treaty sharing relationship.⁴⁷
62. The substantive component of the Duty requires that accommodation be sufficient to address an Indigenous peoples' concerns about impacts on *all* its rights.⁴⁸ Accommodation involves "taking steps to avoid irreparable harm or to minimize the effects of infringement,"⁴⁹ One of the goals of the Duty is to "avoid the impairment of asserted or recognized rights,"⁵⁰ and taking steps to "identify, minimize and address adverse impacts where possible."⁵¹
63. Accommodation measures will increase the cost of the HONI Project, potentially significantly. Because it does not account for these measures, HONI's bid is artificially low. On the other hand, Nextbridge's application fully accounts for the cost of accommodation, which was significant.
64. HONI will have to accommodate for impacts of its project. There are two types of such impacts: (1) impacts to land and rights exercised or asserted on the land; and (2) impacts on the accommodation measures BLP First Nations had developed as the outcome of being consulted and accommodated by Nextbridge. HONI cannot make the BLP First Nations worse off through its consultation and accommodation.

⁴⁵ See paras 7 to 12 of the Affidavit of Chief Collins and testimony of Chief Collins, p. 22, lines 15-28 and p. 23, lines 1-24 of the Transcript from May 16, 2018 Technical Conference; See testimony of Chief Michano, p. 25, lines 10-28 and p. 26, lines 1-12 of the Transcript from May 16, 2018 Technical Conference; See testimony of Chief Desmoulins, p. 23, lines 26-28, p.24 and p.25, lines 1-9 of the Transcript from May 16, 2018 Technical Conference.

⁴⁶ *Mikisew Cree* at para 64; *Delgamuukw* at para 168.

⁴⁷ Jack Woodward, *Native Law* (looseleaf updated 2017, release 4), ch 5 at 111-112.

⁴⁸ *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para 69.

⁴⁹ *Haida Nation* at para 47.

⁵⁰ *Chippewas of the Thames* at para 2.

⁵¹ *Clyde River* at para. 25.

65. HONI admitted that it does not know what the content of the economic partnership with Nextbridge is.⁵² It is thus incorrect for HONI to have asserted as fact that its “offer” to the BLP First Nations of 34% equity in its project, is “more beneficial” than what the BLP First Nations have with Nextbridge.⁵³
66. Aside from the equity participation negotiated with Nextbridge, BLP First Nations negotiated important business and employment opportunities as part of the economic accommodation and participation.
67. Significant time, human capital and financial resources were invested to prepare for the employment and business opportunities. Supercom (owned by the BLP First Nations) and other First Nation businesses have made sizeable expenditures, such as purchasing heavy construction equipment, to prepare themselves for construction with an in-service date of 2020. Many have taken out loans to do so. These businesses are taking a risk and stretching themselves financially to take advantage of the opportunity to work on the Nextbridge project. They do not have the resources to sit on their hands for at least one – and likely many more – years. If this occurs, they are likely to go out of business.⁵⁴
68. There is no certainty about any potential future relationship with HONI should it be granted LTC. Some or many of these business relationships, developed between Supercom and other BLP First Nation owned businesses, and Nextbridge and its general contractor, may not be continued with HONI and its general contractor. As stated, many such businesses may have to fold due to delays.⁵⁵
69. In addition, approximately \$5 million was provided by both provincial and federal governmental sources to cover the costs of employee training programs, which could be wasted if the in-service date is delayed as HONI proposes.⁵⁶
70. About 300 local persons, over 90% of whom are Indigenous individuals from local First Nations, are currently participating in training programs in anticipation of work that will become available in 2020, the in-service date of the Nextbridge project⁵⁷. These persons, and their families, are relying on these jobs.⁵⁸ Given the dependence of family members on such workers’ incomes, it could be many times more than 300 persons affected by delays or losses of work caused by the HONI Project.⁵⁹ Many of these persons are

⁵² See testimony of Ms. Goulais, p.103, lines 25-28 from May 17, 2018 Technical Conference.

⁵³ Introduction & Summary, Lake Superior Link Project - Additional Evidence at p. 12 filed in the file EB-2017-0364 on May 7, 2018.

⁵⁴ See paras 7 to 11 of the Affidavit of Chief Collins and testimony of Chief Michano, p. 25, lines 18-28 and p. 26, lines 1-12 of the Transcript from May 16, 2018 Technical Conference

⁵⁵ Affidavit from Chief Collins at paras 8-10 filed in the file EB-2017-0364 on May 7, 2018.

⁵⁶ Affidavit from Chief Collins at para 7 filed in the file EB-2017-0364 on May 7, 2018.

⁵⁷ *Ibid.*

⁵⁸ See testimony from Chief Collins at p. 22, lines 15-28, p. 23, lines 1-23 of the Transcript from May 16, 2018 Technical Conference and the testimony from Chief Desmoulins at p. 23, lines 26-28, p. 24 and p.25, lines 1-9 of the Transcript from May 16, 2018 Technical Conference.

⁵⁹ See testimony from Chief Collins at p. 23, lines 17-24 of the Transcript from May 16, 2018 Technical Conference.

financially poor; they do not have the savings to wait for one or more years, and pass up other employment opportunities, until the HONI Project is ready to proceed.⁶⁰

71. Some such persons will no doubt have to look for work elsewhere far from their communities. This would then result in family and cultural separations.⁶¹
72. There is a critical human cost to delay. Some of these 300 persons have been deeply affected by systemic racism and colonialism, which leads to despair, substance abuse, suicide attempts and other reactions to trauma.⁶² The Nextbridge project has presented them with “unprecedented” opportunities to turn their lives around, toward hope. If this opportunity fails to materialize, their hopes for a better life may well be set back if not extinguished, and some may fall back into their former harmful patterns.⁶³ Momentum stalled now may have the effect of a full stop for many such persons.⁶⁴
73. No amount of money can ultimately make up for such human fallout. But some high amount of compensatory accommodation would have to be provided by HONI to enable the BLP First Nations to invest in programs that help their members and communities heal from the continuation of trauma. The HONI Project itself – by forcing the end of the self-determined agreement that BLP First Nations had developed with Nextbridge – would be a cause of trauma. It would effectively deny this exercise of self-determination. HONI admits that this type of agreement is just that – a form of self-determination.⁶⁵ And yet in the interests of profit, it would undo it here.
74. All of these costs and losses are even more pronounced and threatening if this one-year delay is prolonged, which will have to be the case in order for the Duty to be met.

⁶⁰ See testimony from Chief Collins at p. 22, lines 15-28, p. 23, lines 1-24 and p. 26, lines 16-28 and p.27 lines 1-13 of the Transcript from May 16, 2018 Technical Conference and the testimony from Chief Michano at p. 25, lines 10-28 and p.26 lines 1-12 of the Transcript from May 16, 2018 Technical Conference.

⁶¹ See testimony from Chief Collins at p. 10, lines 4-28 and p.11, lines 1-9 of the Transcript from May 16, 2018 Technical Conference. See also the following testimonies for the impacts on the members of the First Nations impacted by a delay in the in-service date of the project: Chief Collins at p. 26, lines 16-28 and p. 27, lines 1-13, Chief Desmoulins at p. 25, lines 1-9 and Chief Michano at p. 25, lines 10-27 of the Transcript from May 16, 2018 Technical Conference.

⁶² See testimony from Chief Collins at p. 22, lines 22-25, p. 23, lines 17-24, p. 26, lines 16-28 and p. 27, lines 1-13 of the Transcript from May 16, 2018 Technical Conference, testimony from Chief Desmoulins at p. 7, lines 13-23, p. 16, lines 9-28, p. 17, p. 18, lines 1-4, p. 23, lines 26-28, p. 24, and p. 25, lines 1-9 of the Transcript from May 16, 2018 Technical Conference, and testimony from Chief Michano at p. 25, lines 10-27 of the Transcript from May 16, 2018 Technical Conference.

⁶³ See testimony from Chief Collins at p. 26, lines 16-28 and p. 27, lines 1-5 of the Transcript from May 16, 2018 Technical Conference, testimony from Chief Desmoulins at p. 23, lines 26-28, p. 24 and p. 25, lines 1-9 of the Transcript from May 16, 2018 Technical Conference, and testimony from Chief Michano at p. 25, lines 21-27 of the Transcript from May 16, 2018 Technical Conference.

⁶⁴ See testimony from Chief Michano at p. 25, lines 10-27 of the Transcript from May 16, 2018 Technical Conference.

⁶⁵ See Exhibit KT2.1 submitted by Nextbridge at the Technical Conference on May 17, 2018. See lines 24-27, p. 12 of 74 of Exhibit KT2.1.

75. The bottom line is this: much more time will be required to fulfill the Duty to consult and accommodate – both before and after LTC is decided. LTC would have to be conditional on the full Duty being met before construction starts. These delays will impose costs on the HONI Project directly. These delays will also impose costs and losses on BLP First Nations – and all of these costs would have to be made up by the HONI Project.
76. It is reasonable to expect that the true costs of the HONI Project are much higher than indicated. The Duty has to be met – and the Duty requires that all such costs be accounted and paid for – not by the affected First Nations, but by the proponent.

3. Combined Line: HONI Through Park and Nextbridge the Rest of the Way

77. The BLP First Nations submit that this is not a viable option and should not in any way be considered. The same issues of delays and costs would apply, as they would to LTC being granted to HONI for the entire line.
78. If this option is the one selected by the OEB, HONI will still have to fully meet the Duty for its share of the line (which is the section that would go through the Park).
79. The Park is the issue that will most likely require the most of amount of time – or delays and costs – to allow the Duty to be met. All of the concerns above, about the Park, would apply to this scenario.
80. Further, an economic accommodation or participation agreement would have to be developed for any part of the line through the Park – should the two BLP First Nations with Aboriginal title claims that include the Park be willing to engage in this option at all. It is more likely that attempts to push this line through the Park and cause impacts that the two First Nations do not accept, would result in legal challenges.

4. General Law on the Importance and Purpose of the Duty

81. In case anyone were to think that the Duty is just another box to be ticked, or that it can be weighed against other requirements that do not have the backing of Constitutional legal protection, the importance and purpose of the Duty are explained below.
82. What is the Duty? It is not a mere token gesture, a public relations “photo op,” or the largesse of a ruler towards a subject. It is a nation-to-nation relationship that reconciles “pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁶⁶ Indigenous peoples hold unique rights because “[l]ong before Europeans explored and settled North America, [they] were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures.”⁶⁷ As the original occupiers of North America, Indigenous peoples entered into treaties with the Crown

⁶⁶ *Haida Nation* at paras 20, 25-26, 32, 53; *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 28.

⁶⁷ *Mitchell v MNR*, 2001 SCC 33 at para 9.

allowing for peaceful settlement by Europeans in return for certain rights.⁶⁸ In the Indigenous peoples' understanding, the essence of the treaties was to share ownership and decision-making power over a shared land and resource base.⁶⁹ Even if one accepts the Crown's deceitful claim that the treaties were surrenders of massive tracts of land, Indigenous peoples still retain significant treaty rights in their traditional territories.

83. If Indigenous peoples were properly recognized as an equal sovereign power, the Duty would require the Crown to obtain their "free, prior, and informed consent." It would be a bilateral dual-consent relationship much as it is with Canada and the US over shared lands such as boundary waters.
84. Canadian law is moving in this direction. Canada has ratified and is in the process of implementing the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"),⁷⁰ which authoritatively sets out the requirement for the "free, prior, and informed consent" of Indigenous peoples for any development that might affect their traditional lands.
85. But since Canadian law is not yet fully at the point of always requiring First Nations' consent for development that will affect them, the Duty is meant to substitute for that. This means that it is to be applied widely and deeply.⁷¹
86. The Duty applies very widely. It applies whenever the Crown contemplates conduct, that conduct might adversely affect asserted or known Aboriginal or Treaty rights, and the Crown has actual or deemed knowledge of such rights.⁷²
87. The Duty applies to any effects on any such asserted or known rights, which are also broad. They include rights to the land (title); rights to the resources on the land (hunting, fishing, trapping, gathering and other forms of harvesting); rights to self-determine through protection and practice of their cultures (ceremonial and sacred practices, cultural heritage and archaeological values); and rights to self-determination through participation in governance over their lands and their cultures.
88. Indigenous peoples' right to self-determination is recognized in the *International Covenant on Civil and Political Rights*,⁷³ the *International Covenant on Economic, Social and Cultural Rights*,⁷⁴ and the *UNDRIP*,⁷⁵ all of which Canada has ratified.

⁶⁸ *R v Simon*, [1985] 2 SCR 387 at para 49. See also *Tsilhqot'in* at para 69: "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*."

⁶⁹ See, for example, Michael Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18 UBC L Rev 255 at 261-263.

⁷⁰ GA RES 61/295, UNGA, 107th Plen Mtg, UN Doc A/RES/61/295 (2007).

⁷¹ *Carrier Sekani* at para 43.

⁷² *Haida Nation* at para 35; *Carrier Sekani* at para 31.

⁷³ 19 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁷⁴ 16 December 1966, 993 UNTS 3, art 1 (entered into force 3 January 1976, accession by Canada 19 May 1976).

⁷⁵ Articles 3-4.

89. The Duty is the way in which the bilateral nation-to-nation relationship is carried out. Its purpose is to effect reconciliation – between sovereign peoples in shared lands.⁷⁶
90. The Duty has both procedural (i.e. consultation) and substantive (i.e. accommodation) components.⁷⁷ Given that it falls short of requiring consent in all cases, it is critically important that every ounce of its procedure and substance is fulfilled.
91. The Crown must always consult with Indigenous peoples “in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue.”⁷⁸
92. All of this is to make clear that it is absolutely incumbent on the OEB to not effectively prevent the Duty from being met, or to ignore what the meeting of it will entail and how this will affect the HONI Project timing and costs.

5. Application for Costs

93. As mentioned in their intervention request, the BLP First Nations will be requesting an award of costs for their participation in this proceeding pursuant to section 3.03 (b) and (c) of the Board’s Practice Direction. The BLP First Nations are requesting the OEB to advise, as soon as possible, on the timing and the procedure for this Application for Costs.

⁷⁶ *Mikisew Cree* at para 1.

⁷⁷ *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 at para 137.

⁷⁸ *Delgamuukw* at para 168.