



Lisa (Elisabeth) DeMarco
Senior Partner

5 Hazelton Avenue, Suite 200
Toronto, ON M5R 2E1

TEL +1.647.991.1190

FAX +1.888.734.9459

lisa@demarcoallan.com

August 28, 2018

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

Dear Ms. Walli:

**Re: EB-2017-0319
Enbridge Gas Distribution Inc. application for approval of the cost consequences of
the proposed Renewable Natural Gas Enabling Program**

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-mentioned proceeding. Please find enclosed the Final Argument of Anwaatin, submitted pursuant to Procedural Order No. 4.

Yours very truly,

A handwritten signature in black ink, consisting of a stylized 'L' followed by a long, sweeping horizontal stroke that ends in an arrowhead.

Lisa (Elisabeth) DeMarco

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*,
1998, S.O. 1998, c.15 (Schedule B), s. 36;

AND IN THE MATTER OF an application by Enbridge Gas
Distribution Inc. for an order or orders related to its
Renewable Natural Gas Enabling Program and
Geothermal Energy Service Program;

AND IN THE MATTER OF an application by Enbridge Gas
Distribution Inc. for an order or orders amending or varying
the rates charged to customers for the sale, distribution,
transmission, and storage of gas commencing as of
January 1, 2018.

EB-2017-0319

FINAL ARGUMENT

ANWAATIN INC.

August 28, 2018

INTRODUCTION AND OVERVIEW

1. We are counsel to Anwaatin Inc. (**Anwaatin**) on the Ontario Energy Board EB-2017-0319 proceeding to review Enbridge Gas Distribution Inc.'s (**EGD's**) application for approval of the cost consequences of the proposed Renewable Natural Gas (**RNG**) Enabling Program and Geothermal Energy Service (**GES**) Program, pursuant to section 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B), as amended (the **Act**). On June 26, 2018, the Board granted EGD's request that the portion of the application related to the proposed GES Program be held in abeyance. These written submissions therefore address only EGD's proposed new RNG services described as EGD's RNG Enabling Program.
2. Anwaatin is a collective of Indigenous communities that are focused on achieving reliable, affordable, and sustainable energy for their communities. Anwaatin's members in this proceeding include: Aroland First Nation (**Aroland**); MoCreebec Eeyoud (**MoCreebec**); and the Chiefs of Ontario (**COO**). Aroland, MoCreebec, and the COO together are referred to herein as the **Anwaatin First Nation Communities**.
3. Anwaatin's final argument is focussed on the following Board approved Issues:
 - Issue 4.2: Whether the duty to consult has been adequately discharged with respect to the Aboriginal and treaty rights potentially impacted by the application;
 - Issue 4.1: The Aboriginal and treaty rights impacted by the application;
 - Issue 2.4: The appropriate terms and conditions of the RNG Enabling Program; and
 - Issue 1.1: Whether the RNG Enabling Program should be considered as part of EGD's regulated business.
4. Anwaatin's submissions are organized as follows:
 - I. **Consultation and engagement with Indigenous rights-holding communities**
 - II. **Terms, conditions, and regulation of EGD's proposed RNG business**
 - III. **Requested relief**

DETAILED SUBMISSIONS

I. Consultation and engagement with Indigenous rights-holding communities

5. The Board is being asked in this Application to consider, pursuant to section 36 of the Act, whether certain new pipeline services related to RNG are just and reasonable, and by doing so to determine whether such charges are consistent with the Board's broader public interest mandate as set out in section 2 of the Act.
6. Anwaatin's participation in this Application is, in part, grounded in the Anwaatin First Nations Communities' (i) constitutionally protected Aboriginal rights, title(s), and interests that may be adversely affected by EGD's newly proposed RNG services¹ and (ii) their right to be consulted about the services and potentially accommodated.²
7. Generally, government decision-makers, delegated regulators (including administrative tribunals like the Board) and many proponents have a constitutionally enshrined and judicially enforced duty to consult a given Indigenous community if the decision-maker or proponent is contemplating conduct that might adversely affect a treaty or Aboriginal right that the Indigenous community has or credibly asserts.³ The Board itself has recognized that it has a delegated duty to consult potentially impacted Indigenous communities.⁴
8. Further, the Supreme Court of Canada (the **SCC**) has recently affirmed that decisions that trigger the duty to consult cannot be upheld if the duty to consult has not been met.⁵ Specifically, the SCC has held that the duty to consult, being a constitutional imperative,

¹ *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1989 c 11 (UK), s 35 [*Constitution Act, 1982*].

² See *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas*].

³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, paras 35, 64 [*Haida*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, para 31 [*Carrier Sekani*].

⁴ EB-2017-0147 Enbridge Gas Distribution Inc. Fenelon Falls Pipeline Project, Ontario Energy Board Letter of Direction dated October 30, 2017, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/588166/File/document> [EB-2017-0147 Letter of Direction].

⁵ *Chippewas*, para 59.

gives rise to a special public interest that supersedes other concerns typically considered by tribunals required to act in the public interest.⁶

9. Similarly, the SCC has ruled that the duty to consult is not, as EGD suggests, limited to projects or decisions and conduct that have an immediate impact on land and resources.⁷ It extends to "strategic, higher level decisions", of the same nature as this first strategic Board decision on new RNG services affecting pipelines and lands on or affecting Aboriginal lands, rights, and treaties.
10. The duty to consult has, in fact, been found to extend to decisions from general province-wide infrastructure inquiries, general pipeline review processes, new forest services, to specific pipeline applications and tree licenses.⁸
11. Anwaatin respectfully submits that honouring the duty to consult is critical as the duty seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.⁹ It has both a constitutional and a legal dimension.¹⁰ Its constitutional dimension is grounded in the honour of the Crown.¹¹ This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights.¹² And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples.¹³
12. The honour of the Crown requires a meaningful, good faith consultation process. Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying.¹⁴ Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective

⁶ *Clyde River*, para 40.

⁷ *Carrier Sekani*, para 44.

⁸ *Ibid.*

⁹ *Carrier Sekani*, para 34.

¹⁰ *R v Kapp*, 2008 SCC 41, para 6 [*Kapp*]; *Carrier Sekani*, para 34.

¹¹ *Kapp*, para 6.

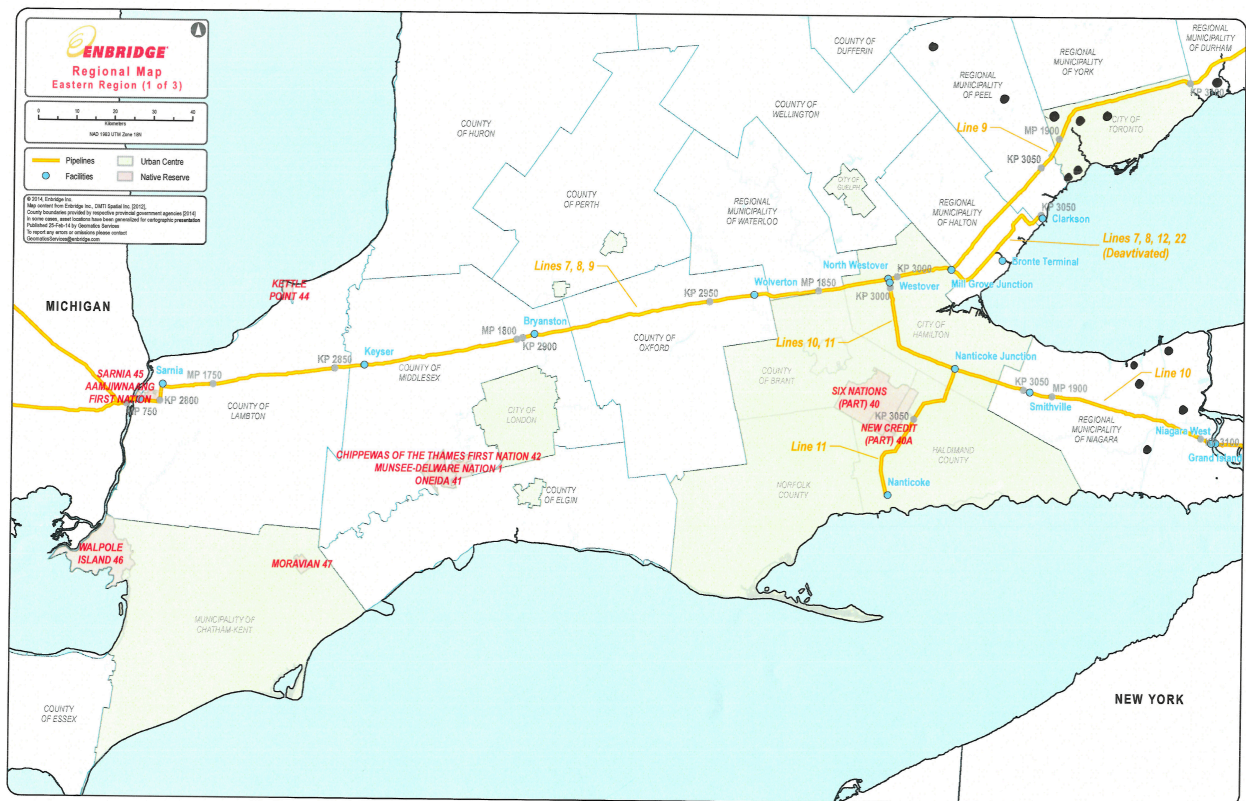
¹² *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, para 24.

¹³ *Haida*, para 53.

¹⁴ *Ibid.*, para 41.

participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.¹⁵

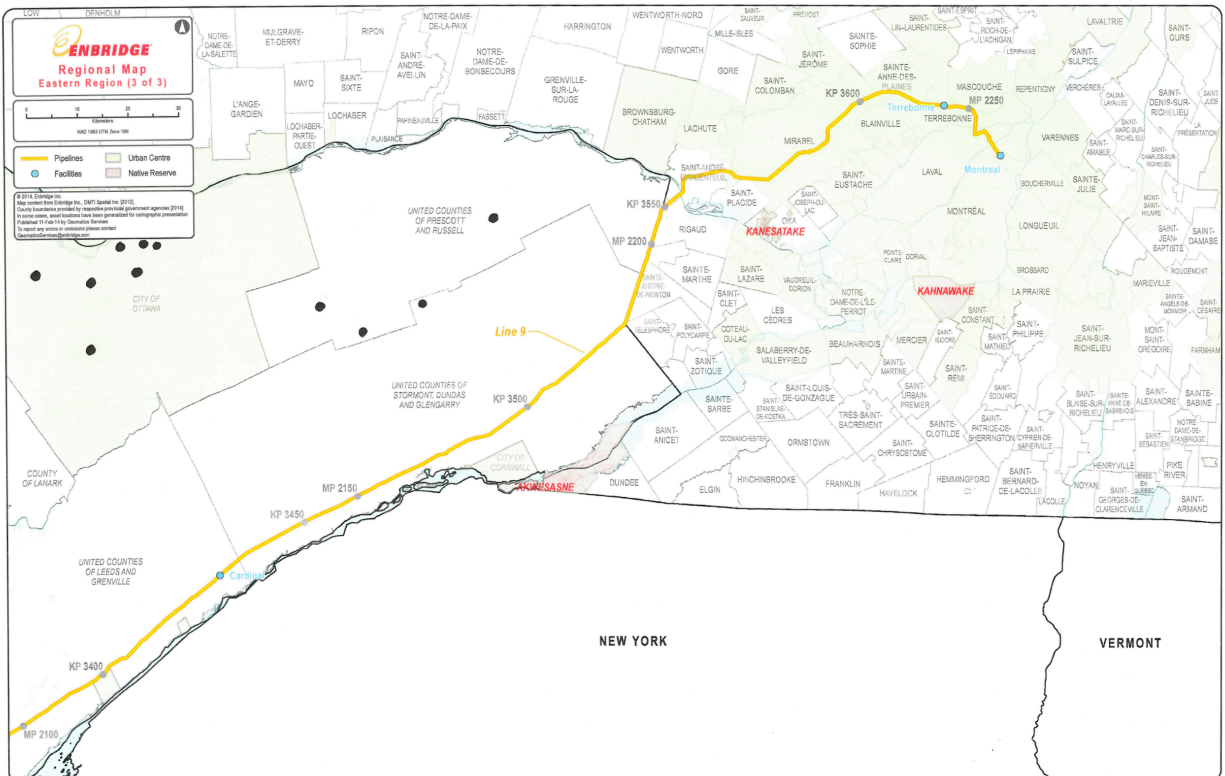
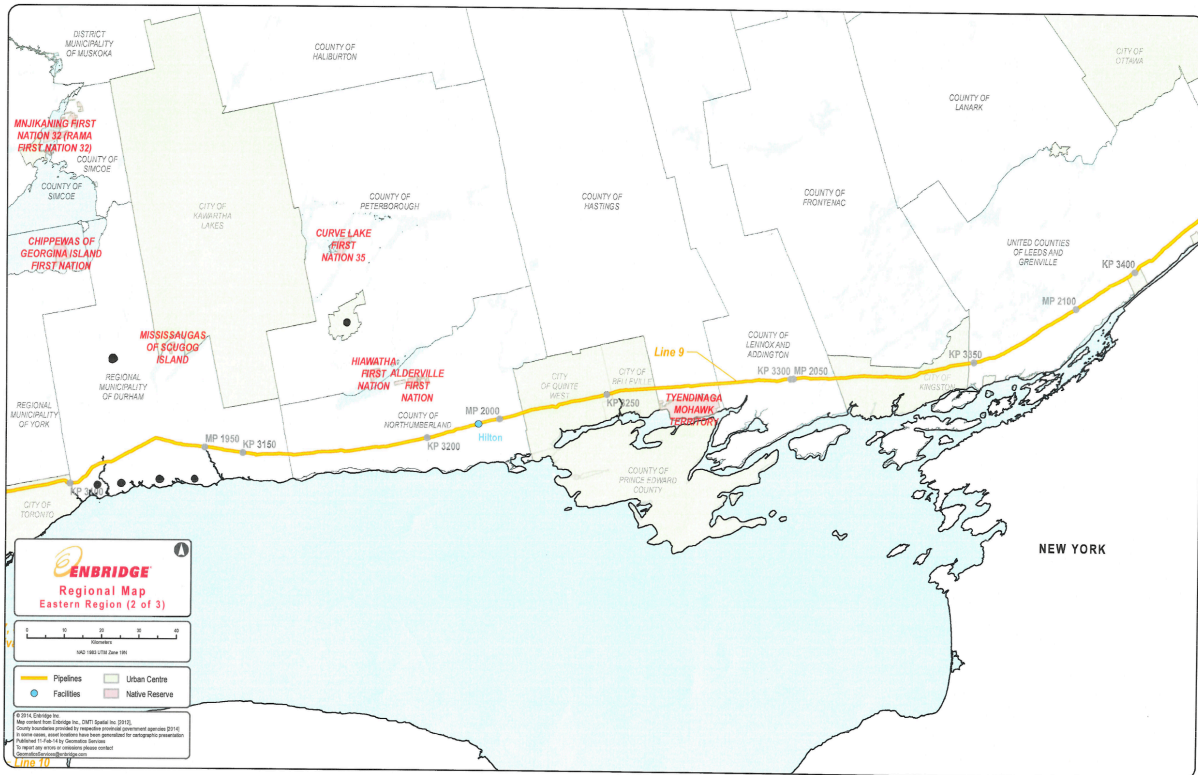
13. In response to Board Staff Interrogatory No. 7, EGD provided the following three maps of southern Ontario setting out the potential locations for RNG facilities (indicated by black dots)¹⁶ and the First Nations and Indigenous communities located in and around these areas.¹⁷ It is clear that the proposed facilities are in and around the lands, treaty areas and traditional territories of a number of the Anwaatin First Nations Communities and communities also represented by its member, COO.



¹⁵ *Haida*, para 23.

¹⁶ Exhibit I.2.EGDI.STAFF.7.

¹⁷ Exhibit JT1.11, Attachment, pages 1-3.



14. The proposed services themselves will require construction of upgrading and injection facilities that will require construction on or around the Anwaatin First Nations Communities and traditional territories. Anwaatin asserts that this and the ongoing purification and injection services may negatively impact aboriginal title, rights to self-government, harvesting rights (fishing and hunting for ceremonial or other processes), and specific treaty rights, reserve lands, and any payments and implied rights associated with them. This assertion is supported by the experiences of Indigenous communities impacted by the development of natural gas facilities and services and the prior involvement and consultation on matters before the Board.¹⁸
15. Anwaatin notes that EGD has expressly indicated that it "has not yet consulted [I]ndigenous rights-holding communities in Ontario with respect to the proposed RNG Enabling [P]rogram."¹⁹ EGD also indicated that:
- Enbridge's proposals have been designed generically to be suitable to all potential customers of the proposed services. Once the Board has rendered a decision in this proceeding Enbridge will assess the degree of interest the various First Nations communities may have in partaking in its RNG Enabling programs and how best to work with these communities to deliver these programs to them.²⁰
16. Anwaatin respectfully submits that EGD thereby expressly acknowledges that it has a duty to consult, but does not appropriately honour the substance of that duty in attempting to delay any and all consultation unless or until the Board's decision has been made on the Application. In accordance with the SCC's decision in *Carrier Sekani*, the duty to consult must apply to this strategic, high level decision regarding new RNG services and the affected Anwaatin First Nations Communities should be consulted prior to the Board's decision in this matter.
17. Anwaatin therefore respectfully request that the Board order EGD to comply with its duty to consult the affected Anwaatin First Nations Communities on these strategic new RNG services prior to ruling that the duty has been discharged on this Application.

¹⁸ See EB-2017-0147 Letter of Direction, *supra* note 4.

¹⁹ Exhibit I.4.EGDI.Anwaatin.7, page 1.

²⁰ Exhibit I.4.EGDI.Anwaatin.7, page 1.

18. In making this request, Anwaatin wishes to expressly acknowledge the potential role that RNG may have in addressing climate change. Specifically, Anwaatin notes that EGD may benefit from the Anwaatin First Nations Communities' traditional ecological knowledge and lengthy history and experiences as stewards of the land. EGD should therefore be encouraged by the Board to honour its duty consult without delay.

II. Terms, conditions, and regulation of EGD's proposed RNG business

19. The questioning and responses at the Technical Conference appear to indicate that a number of aspects of the evidence require clarification and elaboration in the Board's decision on this matter. This includes: the sources of avoided greenhouse gas,²¹ the total potential avoided emissions of the RNG program,²² the monetary value of the avoided carbon tax cost,²³ and last, but not least, the impacts of the climate change policy program changes at the federal and provincial levels.
20. Specifically, EGD filed the federal Clean Fuel Standard Regulatory Framework and a January 2017 report published by the Government of Ontario on its renewable fuel standard as attachments to Exhibit JT1.3.²⁴ Its status should be clarified in light of the federal and provincial climate policy changes.
21. Anwaatin asks that the Board clarify in its decision the assumptions and policy conditions and factual market conditions upon which it relies to make its decision on the RNG services.

III. Requested relief

22. Anwaatin therefore respectfully requests that the Board:
- (a) order EGD to comply with its duty to consult the affected Anwaatin First Nations Communities on these strategic new RNG services prior to ruling that the duty has been discharged on this Application; and

²¹ Exhibit JT1.2, page 1.

²² Exhibit JT1.10, page 1.

²³ Exhibit JT1.6, Attachment.

²⁴ Exhibit JT1.3.

(b) clarify in its decision the assumptions and policy conditions and factual market conditions upon which it relies to make its decision on these RNG services.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS 28th DAY OF AUGUST,
2018.



Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin