DEMARCO ALLAN LLP

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

September 4, 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 (the Proceeding)

We are counsel to Anwaatin Inc. (**Anwaatin**) in the Proceeding. Please find attached Anwaatin's amended Final Argument reflecting new jurisprudence dated August 30, 2018, which is submitted in accordance with Rule 11 of the Ontario Energy Board's (the **Board's**) *Rules of Practice and Procedure* (the **Rules**). Specifically, Anwaatin hereby requests that the Board accept this amended Final Argument (the **Amendment**) in accordance with section 11.01(a) of the Rules.

The Federal Court of Appeal released its judgement in in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (the **Decision**) on August 30, 2018, two (2) business days after the filing of the Anwaatin Final Argument in the Proceeding.

The Decision quashes the National Energy Board certificate of public convenience and necessity for the Trans Mountain pipeline expansion project, in part on the duty to consult grounds that are also squarely raised by Anwaatin in this Proceeding. The Decision reflects the Federal Court of Appeal's finding that the process used by the Crown to discharge its duty to consult was inadequate. The Court quashed the approval and required further consultation to remedy the uncertainty.

Anwaatin respectfully submits that the Decision represents new information and law that is clearly relevant to the issues and arguments now before the Board particularly in relation to Issues 4.1 and 4.2.

We ask that the Board accept this amended Final Argument as it is being provided to the Applicant and the Board with ample time for the Applicant to reply without prejudice, prior to its September 11, 2018, filing deadline. Alternatively, should the Applicant wish further time to reply to this new jurisprudence, and the Board so wish, Anwaatin has no objection to an extension being granted to Enbridge for its reply.

Sincerely,

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

AMENDMENT

ANWAATIN INC.

September 4, 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 (the **Application**), 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 services[1] 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, and will not, 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

[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; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].

imperative, 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

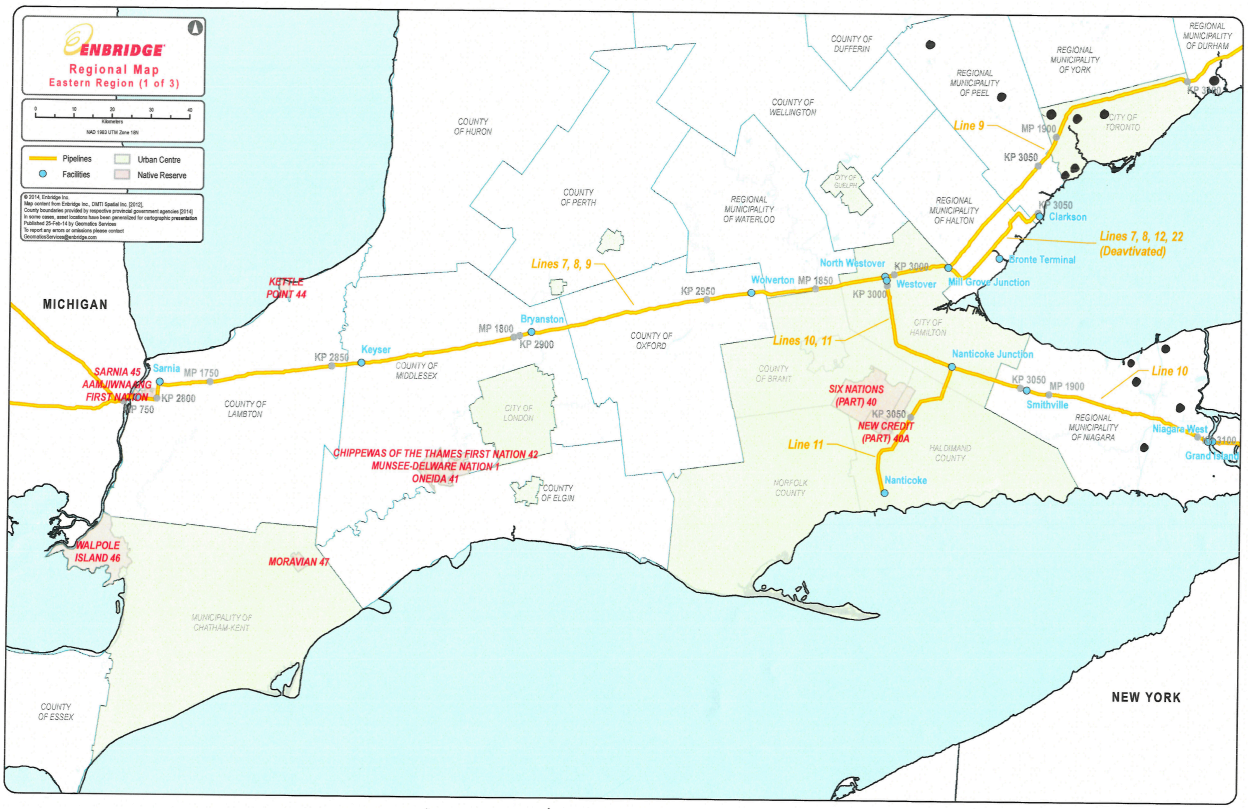
[6] *Clyde River*, para 40.
[7] *Carrier Sekani*, para 44.
[8] Ibid.
[9] *Carrier Sekani*, para 34.
[10] *R v Kapp*, 2008 SCC 41, para 6 [*Kapp*]; *Carrier Sekani*, para 34.
[11] *Kapp*, para 6.
[12] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, para 24.
[13] *Haida*, para 53.
[14] Ibid, para 41.

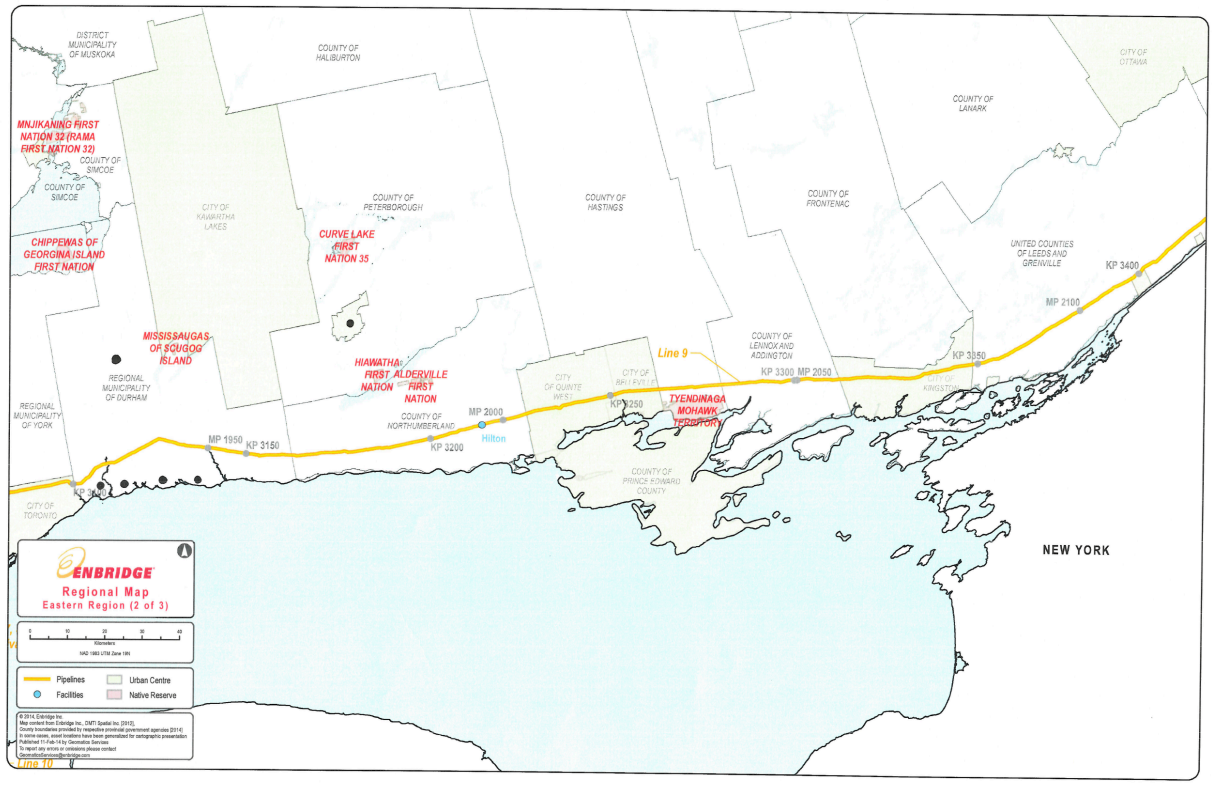
participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.[15]

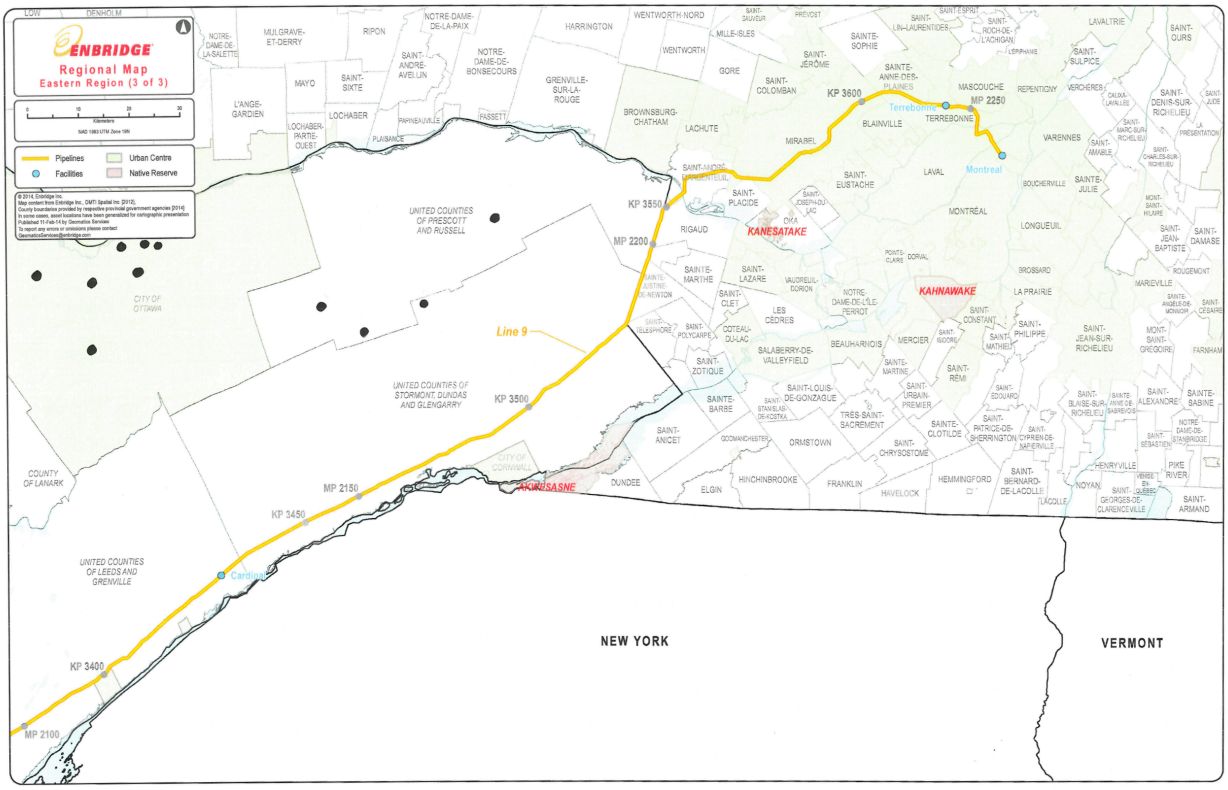
13. The Crown is required to do more than receive, document, and understand the concerns of Indigenous communities. It is also required to engaged in a "considered, meaningful two-way dialogue".[16] Indigenous communities are entitled to a dialogue that demonstrates that the Crown (i) not only heard, but also gave serious consideration to the specific and real concerns that Indigenous communities put to the Crown, (ii) gave serious consideration to proposed accommodation measures, and (iii) explained how the concerns of the Indigenous communities impacted the Crown's decision to approve (or not approve) the project.[17] Further, the Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.[18] No such consultation occurred in this proceeding.

14. 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)[19] and the First Nations and Indigenous communities located in and around these areas.[20] 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 Nation Communities and communities also represented by its member, COO.

[15] *Haida*, para 23.
[16] *Tsleil-Waututh*, para 558.
[17] *Tsleil-Waututh*, para 563.
[18] *Tsleil-Waututh*, para 564.
[19] Exhibit I.2.EGDI.STAFF.7.
[20] Exhibit JT1.11, Attachment, pages 1-3.


ENBRIDGE
Regional Map
Eastern Region (1 of 3)
Pipelines
Facilities
Urban Centre
Native Reserve
MICHIGAN
NEW YORK
KETTLE POINT 44
SARNIA 45
AAMJIWNAANG FIRST NATION
WALPOLE ISLAND 46
MORAVIAN 47
CHIPPEWAS OF THE THAMES FIRST NATION 42
MUNSEE-DELAWARE NATION 1
ONEIDA 41
SIX NATIONS (PART) 40
NEW CREDIT (PART) 40A
Sarnia
Kerser
Bryanston
Wolverton
North Westover
Westover
Mill Grove Junction
Nanticoke Junction
Nanticoke
Smithville
Clarkson
Bronte Terminal
Line 9
Line 10
Line 11
Lines 7, 8, 9
Lines 10, 11
Lines 7, 8, 12, 22
(Deavtivated)
COUNTY OF HURON
COUNTY OF PERTH
COUNTY OF WELLINGTON
COUNTY OF DUFFERIN
COUNTY OF OXFORD
COUNTY OF MIDDLESEX
COUNTY OF LAMBTON
COUNTY OF ELGIN
COUNTY OF ESSEX
COUNTY OF BRANT
NORFOLK COUNTY
HALDIMAND COUNTY
REGIONAL MUNICIPALITY OF WATERLOO
REGIONAL MUNICIPALITY OF PEEL
REGIONAL MUNICIPALITY OF YORK
REGIONAL MUNICIPALITY OF HALTON
REGIONAL MUNICIPALITY OF DURHAM
REGIONAL MUNICIPALITY OF NIAGARA
CITY OF TORONTO
CITY OF GUELPH
CITY OF LONDON
CITY OF HAMILTON
MUNICIPALITY OF CHATHAM-KENT


ENBRIDGE
Regional Map
Eastern Region (2 of 3)
Pipelines
Facilities
Urban Centre
Native Reserve
NEW YORK
MNJIKANING FIRST NATION 32 (RAMA FIRST NATION 32)
CHIPPEWAS OF GEORGINA ISLAND FIRST NATION
MISSISSAUGAS OF SCUGOG ISLAND
CURVE LAKE FIRST NATION 35
HIAWATHA FIRST
ALDERVILLE FIRST NATION
TYENDINAGA MOHAWK TERRITORY
Hilton
Line 9
Line 10
COUNTY OF HALIBURTON
COUNTY OF SIMCOE
COUNTY OF PETERBOROUGH
COUNTY OF HASTINGS
COUNTY OF FRONTENAC
COUNTY OF LANARK
COUNTY OF LENNOX AND ADDINGTON
COUNTY OF NORTHUMBERLAND
COUNTY OF PRINCE EDWARD COUNTY
UNITED COUNTIES OF LEEDS AND GRENVILLE
CITY OF OTTAWA
CITY OF TORONTO
CITY OF KAWARTHA LAKES
CITY OF QUINTE WEST
REGIONAL MUNICIPALITY OF DURHAM
REGIONAL MUNICIPALITY OF YORK



15. The proposed services themselves will require construction of upgrading and injection facilities that will require construction on or around the Anwaatin First Nation 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.[21]

[21] See EB-2017-0147 Letter of Direction, *supra* note 4.

16. 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."[22] 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.[23]

17. 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 Nation Communities should be consulted *prior* to the Board's decision in this matter. This is supported by the Federal Court of Appeal's recent decision in *Tsleil-Waututh Nation v Canada (Attorney General)*.[24]

18. The design and execution of the consultation process must also serve to facilitate a meaningful two-way dialogue on the concerns of Indigenous communities and provide an opportunity for the Crown, or its representatives, to make changes to proposed actions and policies based on information and insight obtained through consultation.[25] Anwaatin respectfully submits that no such meaningful, two-way dialogue on the concerns of Indigenous communities has occurred. Anwaatin's concerns and insights have not been considered and no related solutions are reflected in the Application. EGD's consultation with Indigenous communities on the RNG program therefore does not discharge the duty to consult.

[22] Exhibit I.4.EGDI.Anwaatin.7, page 1.
[23] Exhibit I.4.EGDI.Anwaatin.7, page 1.
[24] See *Tsleil-Waututh*.
[25] *Tsleil-Waututh*, paras 512, 558-559.

19. Anwaatin therefore respectfully request that the Board order EGD to comply with its duty to consult the affected Anwaatin First Nation Communities on these strategic new RNG services prior to ruling that the duty has been discharged on this Application.

20. 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 Nation Communities' traditional ecological knowledge and lengthy history and experiences as stewards of the land and related resources. EGD should therefore be encouraged by the Board to honour its duty consult without delay and pursue prompt and meaningful consultation with the affected Anwaatin First Nation Communities before the decision in this proceeding is rendered.

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

21. 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,[26] the total potential avoided emissions of the RNG program,[27] the monetary value of the avoided carbon tax cost,[28] and last, but not least, the impacts of the climate change policy program changes at the federal and provincial levels.

22. 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.[29] Its status should be clarified in light of the federal and provincial climate policy changes.

23. 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.

[26] Exhibit JT1.2, page 1.
[27] Exhibit JT1.10, page 1.
[28] Exhibit JT1.6, Attachment.
[29] Exhibit JT1.3.

III. *Requested relief*

24. Anwaatin therefore respectfully requests that the Board:

(a) order EGD to (i) 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 (ii) pursue prompt and meaningful consultation with the affected Anwaatin First Nation Communities before the Board's decision on the Application is rendered; and

(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 4th DAY OF

SEPTEMBER, 2018.

Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin