ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15 (Schedule B), s. 92;

AND IN THE MATTER OF applications by: a) Upper Canada Transmission Inc., on behalf of Nextbridge Infrastructure ("**Nextbridge**") for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario (the "**East West Tie**"); b) Hydro One Networks Inc. ("**Hydro One**") for leave to construct facilities to upgrade existing transmission station facilities in the Districts of Thunder Bay and Algoma, Ontario (the "**Wawa TS Upgrade**"); and c) Hydro One for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario (the "**Lake Superior Link**");

EB-2017-0182
EB-2017-0194
EB-2017-0364

INTERVENOR ARGUMENT

MICHIPICOTEN FIRST NATION

1. I am counsel to Michipicoten First Nation **("MFN")**, an intervenor in the Ontario Energy Board (the "**Board**") combined proceedings EB-2017-0182, EB-2017-0194 and EB-2017-0364 (the "**Applications"**), for leaves to construct the East West Tie, Wawa TS Upgrade and Lake Superior Link, pursuant to section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B), as amended (the **"Act**").

2. MFN's intervention in the Applications is two-fold: a) it has Aboriginal Rights that may be adversely affected by the Applications and b) as an affected landowner in the proposed route through its Reserve.

3. Under Section 96(2) of the Act, the Board considers the interests of consumers with respect to prices and the reliability and quality of electricity service when considering whether granting leave to construct is in the public interest.

4. The Board itself has recognized that the Duty to Consult and Appropriately Accommodate (the "**Duty**") is within the contours of its jurisdiction.[1] A generous, purposive approach is brought to the Duty.[2]

5. The constitutional dimension of the Duty gives rise to a special public interest, surpassing economic dimensions. When the Duty is not sufficiently discharged, the public interest is not

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[1] See EB-2011-0140 Phase One Decision and Order for the Designation for the East West Tie Line, available on the Board website, in which Aboriginal Consultation was an identified Board criterion.

[2] See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 para 43 available online at https://scc-csc.lexum.com.

served. [3] A project permit that breaches the constitutionally protected rights of Indigenous Peoples cannot serve the public interest and is vulnerable to judicial review.[4]

6. MFN's status as a First Nation with whom there must be consultation and appropriate accommodation, and its status as an affected landowner cannot be decoupled. The two are inextricably linked.

7. Hydro One's presumption about routing the Lake Superior Link through MFN's Reserve was a unilateral and cavalier assumption (the "**Unilateral and Cavalier Assumption**"), antithetical to even the most basic elements of the Duty.[5] It directly affects Hydro One's budget and timeline for the Lake Superior Link and the economic interests of consumers.

8. The Unilateral and Cavalier Assumption is contrary to what MFN and its advisors have explicitly and repeatedly told Hydro

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[3] See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 para 70; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* 2017 SCC 40, para 40 available online at https://scc-csc.lexum.com.

[4] See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 para 63 and para 75; Sari Graben and Abbey Sinclair "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (Fall 2015) UTLJ, page 416, last sentence, available online at papers.ssrn.com; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* 2017 SCC 40, para 24, available online at https://scc-csc.lexum.com.

[5] In fact, it evinced a perversion of the Duty, which requires that consultation be a responsive, meaningful, iterative process, not a forum to defend or impose predetermined decisions. It is not mere "note-taking": see *Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153 at para 562* available online at http://www.documentcloud.org/documents/4801795-Fed-Court-of-Appeal.html. It is not merely affording a First Nation "an opportunity to blow off steam before proceeding to do what was intended all along": see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage [2005] 2 SCR 388 at para 54* available online at https://scc-csc.lexum.com .

One in written correspondence, orally in meetings, and on the record in the Lake Superior Link application.[6]

9. And yet, Hydro One has not been transparent to the regulator about this routing risk. It has not highlighted this risk in its Risk register (Filed 2018-09-24, EB-2017-0364, as Exhibit I-1-13, Attachment 1)[7]**.** Instead, it has misled the regulator by references to a path forward to cross MFN's Reserve.[8]

10. By not highlighting this risk, Hydro One has avoided transparently informing the regulator of the true costs of having to route around MFN's Reserve (the "**By-pass**"). Ie. they have not factored in the $ 1.34 million per kilometer [9] cost of by-passing the 28.5 hectares of "new land" they require on MFN's Reserve for Lake Superior Link[10]. Nor have they transparently informed that, since the By-pass has never been studied, what the resultant costs and delays of it are. Had the By-pass been identified as the significant risk that it is, the regulator and other parties to the Applications could have interrogated Hydro One on its impacts to schedule and budget; on whether it would

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[6] The Chief of MFN's letter of comment to the Board in EB-2017-0364, dated June 20, 2018, available on the Board website, clearly and unambiguously states that "even discussing routing Lake Superior Link through our Reserve is a non-starter until the use and occupation of the current line is properly effectuated".

[7] Hydro One includes the risk of MFN not accepting current rental formulas for an *Indian Act* permit; but, not the risk (of which they have repeatedly been made aware) that MFN *will not consent to a permit at all.*

[8] Final Transcript for EB-2017-0182-0364 Volume 2, Wednesday October 3, 2018, Page 9, line 15.

[9] Testimony of Mr. Karunakaran, Final Transcript for EB-2017-0182-0364 Volume 1, Tuesday Oct 2, 2018, Page 95, line 23.

[10] Hydro One application for Leave to Construct Lake Superior Link, EB-2017-0364, Exhibit E, Tab 1, Schedule 1, page 8, line 10, on Board website. It is unclear whether Hydro One, in referencing "new land" is under the legally erroneous assumption that it can utilize the ROW for the Existing Line, as defined in paragraph 12 of these submissions. As paragraphs 12-18 of these submissions explain in detail, the Existing Line is on MFN's Reserve in contravention of the *Indian Act* , R.S.C, 1985, c.I-5, as amended.

necessitate an amended leave to construct application and/or other project permits, including environmental; and, most significantly, on whether it is even possible, technically, to construct on the rocky and uneven terrain of the By-pass?[11]

11. Hydro One has also failed to hear the Chief's strong and clear voice, as representative of the wishes of her community, about the viability of Lake Superior Link being routed across MFN's Reserve. This is disrespectful and dishonorable. The community interprets this as an implication that First Nations Peoples have no say over who uses or occupies their home.[12]

12. As highlighted in footnote 6, the Chief has consistently and unconditionally told Hydro One that it must regularize the use and occupation of its current line on the Reserve (the "**Existing Line"**) before the community will even consider a second line on the Reserve.[13]

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[11] It is curious that Hydro One did not specifically identify this routing risk, in light of its experience with the Niagara Reinforcement Project. In that "never brought into service" project, the last two kilometers could not be completed due to a materialized risk regarding an Indigenous land dispute. In EB-2006-0501, Hydro One's rate application for 2007 and 2008 transmission rates, available on the Board website, it sought incentive-based regulatory treatment for this project. Ie.,In seeking recovery of its costs for this cancelled/abandoned project, it asked for special rate treatment beyond the conventional treatment.

[12] Note that First Nations are distinct from private landowners whose lands may be expropriated once leave to construct is granted. AANDC has confirmed that it will no longer use s. 35 of the *Indian Act*, R.S.C, 1985, c.I-5, as amended (the expropriation/"lands taken for public services" section), for transmission lines. The *Indian Act is* available online at laws-lois.justice.gc.ca.

[13] When Mr. Fair said [at Final Transcript for EB-2017-0182-0364, Volume 3, October 4, 2018, Page 16, lines 5-7], that Hydro One has been having conversations with MFN on a section 28(2) permit for the Lake Superior Link, that was patently false. There have been no such discussions. Any meetings or discussions had were with regard to the Existing Line.

13. Hydro One asserts that the Existing Line on MFN's Reserve is not relevant to the Application for the Lake Superior Link.[14] This pat answer is too simple. No one is suggesting that resolving the dispute over the legitimacy of the Existing Line on MFN's Reserve is the mandate of the Board. But the problems with the Existing Line underpin MFN's unwillingness to allow the routing of the Lake Superior Link through its Reserve, a fact that Hydro One was made repeatedly aware of. To the extent that the By-pass (as defined in paragraph 10) increases costs and timelines for the Lake Superior Link, and hence electricity prices for consumers, this is very much within the Board's jurisdiction. In fact, it is the crux of it. And yet, no information on the By-pass was introduced by Hydro One. This is confounding and dishonourable.

14. The problems with the Existing Line include (but are not confined to) the significant issues described in this paragraph. Hydro One has no section 28(2) *Indian Act* permit on MFN's Reserve for the Existing Line.[15] More than twenty years after the legislative re-organization of Ontario Hydro, Hydro One continues to rely on a 1984 permit issued to Ontario Hydro.[16]

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[14] Final Transcript for EB-2017-0182-0364, Volume 3, Thursday October 4, 2018, page 30, lines 4-5.

[15] Section 28 (1) of the *Indian Act* says: "Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void". Section 28(2) says: "The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve".

[16] In a letter dated September 25, 2018, Mr. Robert Berardi, VP of Shared Services at Hydro One, wrote to Mr. John Kim Bell, Energy Advisor to MFN (the "**Letter**") and said the following: "Title [to the transmission line which traverses MFN's Reserve] and the 1984 Permit remains with the Ontario Electricity Financial Corporation". The Letter can readily be made available to the Board and other parties to the Applications if required and instructive.

This permit, by its express terms, was non-assignable.[17] The Existing Line on the Reserve is for transmission and does not, as a distribution line would, service the electricity needs of MFN. To further complicate an already complicated situation, Hydro One or an affiliate now owns another line on MFN's Reserve, a line that was sold to it by Great Lakes Power Transmission (the "**Former GLPT Line**"). MFN, through its advisors, has repeatedly asked Hydro One to provide a copy of the section 28(2) permit for this Former GLPT Line over the Reserve.[18] No fully executed permit for the Former GLPT Line was ever provided, nor was an admission that there is no permit for the Former GLPT Line ever given. MFN was merely deflected in its request. It was likewise deflected in its concerns, clearly communicated to Hydro One, that herbicides were being sprayed on its Reserve. Lastly, on September 16, A.G. Chapman Enterprises was performing brush clearing on the Reserve for a MFN elders' ceremony, to be held on the northwest side of Dore Lake. As part of this exercise, a damaged transmission tower was identified. As a result of safety concerns, crews vacated the area immediately. The issue had not been fully investigated or resolved by September 25, 2018 when the Letter (referred to in footnote 16) was received. This caused great consternation in the community about whether, in light of the contents of the Letter, they should be

[17] Section 2 of the 1984 permit states clearly and unconditionally that "Ontario Hydro will not assign the rights hereby authorized, without the prior approval of the Michipicoten Band and Her Majesty". This 1984 permit is registered in the Indian Lands Registry System ("ILRS"), PIN 402525398, Registration Number 95889.

[18] Emails from Mr. John Kim Bell, Energy Advisor to MFN, to Ms. Christine Goulais, Sn. Manager, Indigenous Relations with Hydro One dated August 30, 2018 and September 10, 2018; emails from Marcie Zajdeman, Counsel to MFN, to Ms. Goulais dated September 25, 2018 and September 27, 2018 (collectively, the "**Emails"**). The Emails can readily be made available to the Board and other parties to the Applications if required and instructive.

dealing with OEFC on the safety and reliability concerns of the damaged tower.[19]

15. An analogy from Landlord and Tenant law may be helpful in illustrating the importance and relevance of the Existing Line. For this analogy, MFN is "the **Landlord**"; Ontario Hydro is "the **Deceased Tenant**"; and Hydro One is "the **"Squatter**". The Existing Line is on the "**First Floor"** of MFN's home; and, Lake Superior Link would be on the **"Second Floor"** of MFN's home.

16. The Landlord leased the First Floor to the Deceased Tenant (the "**First Floor Lease"**). The First Floor Lease was non-assignable. The Deceased Tenant invited the Squatter to live with it. The Deceased Tenant died. The Squatter stayed on the First Floor, even though it was not a party to the non-assignable First Floor Lease and did not have its own lease (a "**New First Floor Lease"**) with the Landlord. The Landlord tried to negotiate a New First Floor Lease with the Squatter, but was not able to. Negotiations on the New First Floor Lease were acrimonious and the relationship between the Landlord and the Squatter deteriorated.

17. Still, the Squatter unilaterally and cavalierly thought it could rent the Second Floor from the Landlord. The Landlord told the Squatter that even discussing renting the Second Floor was a non-starter until there was a proper New First Floor Lease.

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[19] The Letter does say that Hydro One maintains the existing line by way of an agreement with OEFC. However, to the extent that such agreement concerns matters relating to a line which uses and occupies the Reserve, it must comply with section 28 of the *Indian Act* or is void under that Act. MFN did not consent to this Hydro One/OEFC agreement , and it is void under the *Indian Act.* In interpreting statutes relating to Indigenous Peoples, ambiguities should be resolved in favour of the Indigenous Peoples: *Nowegijick v. The Queen,* [1983]1 S.C.R. 29; *Mitchell v. Peguis Indian Band* [1990] 2 S.C. R. 85 at paragraph 143, both cases available online https://scc-csc.lexum.com . This principle applies equally when third parties are involved: *Mitchell* at page 99.

18. The Squatter did not transparently disclose the risk that it might not be allowed to rent the Second Floor. Nor did it disclose what the costs and timelines would be of finding alternate accommodation.

19. MFN has been negotiating a Section 28(2) *Indian Act* permit with Nextbridge since early 2018. These negotiations are progressing amicably, respectfully, and productively; and, are almost concluded. In Landlord and Tenant terminology, the Landlord is close to concluding a Second Floor Lease with Nextbridge.

20. MFN has also told Hydro One, repeatedly and consistently, that it opposes the routing of Lake Superior Link through Pukaskwa National Park.[20]

21. MFN has also made Hydro One aware that the 45-day period to conclude a participation agreement with the Bamkushwada LP

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[20] In a letter dated October 11, 2018 from Chief Tangie to Ms. Christine Goulais, (the "**Chief's Communication"**) Chief Tangie states: "I am writing to express my deep disappointment and frustration with Hydro One. I am receiving reports and the transcripts from the OEB hearings last week and am shocked at the false representations HONI executives, including you, are making about your relationship with Michipicoten First Nation. Michipicoten First Nation has stated very clearly that there is no path forward for HONI to build a second line across our Reserve lands unless and until you resolve the current dispute where HONI is operating OEFC's line without a proper Section 28(2) Permit. Further, we have also stated clearly that the proposed line should not go through Pukaskwa Park. Moreover, your efforts to falsely classify the Wawa Transformer Upgrade to portray that the project has little or no impacts was verified from the evidence of another SARs report that countered your report's conclusion that there were no Species At Risk Birds at the site. We will not withdraw our elevation request for a Category C Environmental Assessment and associated depth of consultation". The Chief's Communication can readily be made available to the Board and other parties to the Application if required and instructive.

First Nations, of which MFN is a member, is unrealistic in the extreme. From MFN's perspective, nothing with Hydro One negotiations proceeds expeditiously. It took over three months merely to conclude a simple consultation agreement with Hydro One for the Wawa TS Upgrade. Hydro One has been unable to conclude a consultation agreement with MFN for the Lake Superior Link.[21]

22. For all of the reasons set out above, MFN submits that neither the economic interests of consumers, nor the public interest, are served by granting Hydro One leave to construct the Lake Superior Link. Therefore, MFN respectfully submits that the Board award Nextbridge leave to construct the East West Tie and deny Hydro One leave to construct the Lake Superior Link.

[21] However, there has been, and continues to be, negotiations on a consultation agreement. MFN understands that "at all stages, good faith is required on both sides…[and that it] must not frustrate reasonable, good faith [consultation] attempts". See *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 73 at para 42 available online at https://scc-csc.lexum.com. MFN acts accordingly and would never thwart consultation efforts.

ALL OF WHICH RESPECTFULLY SUBMITTED THIS 31ST DAY OF OCTOBER, 2018.

Marcie Zajdeman
Counsel for Michipicoten First Nation