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

ONTARIO ENERGY BOARD

Upper Canada Transmission Inc. (on behalf of Nextbridge Infrastructure)
Application for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario

-and-

Hydro One Networks Inc.
Application to upgrade existing transmission station facilities In the Districts of Thunder Bay and Algoma, Ontario

-and-

Hydro One Networks Inc.
Application for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario

SUBMISSION OF THE INTERVENOR BIINJITIWAABIK ZAAGING ANISHINAABEK

October 31, 2018

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Introduction

1. The Biinjitiwaabik Zaaging Anishinaabek (“BZA”), does not support or oppose either Hydro One or Nextbridge in their respective Leave to Construct applications at issue in these proceedings. Rather, Biinjitiwaabik Zaaging Anishinaabek submits that regardless of which proponent (if either) is awarded Leave to Construct, the Board’s order must be conditional that the successful proponent meaningfully and adequately consult and accommodate, and obtain the consent of, the Biinjitiwaabik Zaaging Anishinaabek prior to commencing construction.

2. The Biinjitiwaabik Zaaging Anishinaabek submits that this Board has the jurisdiction to make such an order and is required by recent jurisprudence of the Supreme Court of Canada to

concern itself with ensuring that the 18 identified Indigenous communities have been adequately consulted and accommodated.

The Biinjitiwaabik Zaaging Anishinaabek

3. Biinjitiwaabik Zaaging Anishinaabek is a First Nation community in Northwestern Ontario. The Biinjitiwaabik Zaaging Anishinaabek reserve lands are located approximately 50km north of the proposed transmission corridor[1], and the traditional territory extends throughout the region.

4. It is one of 18 communities identified by the Ministry of Energy to be consulted "equally" on the project[2]. HONI has stated that it was directed to consult with all Indigenous communities equally. Nextbridge's application provides that Indigenous communities to be consulted with were identified in an MOU between Nextbridge and the Crown signed November 2013. BZA submits that nothing in this MOU suggests that the communities were not to be consulted equally.[3]

5. Biinjitiwaabik Zaaging Anishinaabek has an unextinguished aboriginal title claim[4] which the Crown has knowledge of.

6. The proposed transmission line crosses the traditional territory of the Biinjitiwaabik Zaaging Anishinaabek.[5] The independent evidence that has been collected by Nextbridge in its EA process activities provides that the line traverses the Black Spruce Forest Management Unit where the Biinjitiwaabik Zaaging Anishinaabek hunt, fish and gather.[6] Biinjitiwaabik Zaaging Anishinaabek submits that its traditional territory extends beyond this forest management unit.

7. There is no evidence in these proceeding that the Crown has ever determined, suggested, or maintained that the Biinjitiwaabik Zaaging Anishinaabek is:

    a. Not a proximate community to the transmission line;
    b. A community that is less adversely affected by the project; or

[1] Hearing Transcript Volume 3, October 4, 2018HONI testimony, p.76.
[2] HONI Response to OEB IR 11, Exhibit I Tab 1, Schedule 11 page 5/8.
[3] MOU between the MOE and Nextbridge executed November 4th 2013, included as Appendix A to the Aboriginal Consultation Plan for the East-West Tie Transmission Project, Schedule D to the January 22, 2014 Monthly Report filed in EB-2011-0140 (The designation proceedings).
[4] Hearing Transcript Volume 3, October 4, 2018, p.82; Hearing Transcript Volume 5, October 10, 2018 p. 86
[5] Hearing Transcript Volume 5, October 10, 2018 p. 71; Affidavit of Melvin Hardy sworn May 8, 2018. EB-2017-0364
[6] Exhibit K5.2, BZA Nextbridge Cross-examination compendium, pages 4-5; Hearing Transcript Volume 5, October 10 p. 72 -73

c. A community that is entitled to less in terms of participation benefits than what any other community has been offered.

The Duty to Consult and the OEB

8. Hydro One has submitted that consultation with First Nations and Metis groups is outside the scope of what the Board may consider in a section 92 Application, and is instead "clouding" the consideration of the competing merits of the respective Leave to Construct Applications. [7]

9. Throughout these proceedings, the consultation obligations of Hydro One and Nextbridge have been continuously discussed and debated. The consultation and accommodation practices and logs of each proponents are part of the record, and have been parsed, challenged and debated by the Applicants, Intervenors and Board Staff in this proceeding.

10. Both applicants have addressed Indigenous consultation in their applications for leave to construct to a significant extent. If they felt that Indigenous consultation was not relevant they surely would not have even considered this issue.

11. The issue of consultation arises in the designation decision from 2013 and procedural orders of these applications. For example, in Procedural Order No. 1, concerning the motion to consider whether HONI's application for leave to construct should be dismissed, the Board issued a rather lengthy order pertaining specifically to the issue of Indigenous consultation[8].

12. In its July 19, 2018 Decision and Order, the Board stated:

> "The OEB's role in an application for leave to construct a transmission line is defined in s.96(2) of the OEB Act. To the extent that the issues raised by these intervenors affect the OEB's mandate under s.96(2) of the OEB Act, including the interests of consumers with respect to prices, and the reliability and quality of electricity service, they will be considered in the OEB's review of a leave to construct application. Similarly, the issue of what impact (if any) recent jurisprudence has on the OEB's role in discharging the Crown's duty to consult can also be addressed at that time." [9]

13. Biinjitiwaabik Zaaging Anishinaabek submits that the Board must consider the adequacy of Indigenous consultation when making a determination on the competing section 92 leave to construct applications. The Board must do so for the following reasons:

[7] Paragraph 7, Argument in Chief of Hydro One Networks Inc. EB-2017-0364/0184/0192 filed October 22nd 2018.
[8] EB-2017-0364 Procedural Order No. 1 April 27, 2018
[9] Decision and Order EB-2017-0364, July 19, 2018.

a) Jurisprudence on the Duty to Consult in regulatory proceedings requires the Board to consider the duty to consult and accommodate;

b) The Board has assumed jurisdiction to consider the duty to consult and accommodate by way of the procedural orders and designation decision of 2013 that is has issued; and

c) The adequacy of consultation and accommodation with First Nation and Metis groups is relevant in considering the interests of consumers with respect to prices and the reliability and quality of electricity service.

The Duty to Consult

14. Section 35(1) of the Constitution states:

"The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed."[10]

15. Since the seminal Supreme Court decision in *Haida Nation v British Columbia* (2004), Canadian jurisprudence has been unequivocal that the Crown has a Duty to Consult with Aboriginal peoples, and that this duty arises from the Honour of the Crown. The *Haida Nation* decision is part of a long line of Supreme Court decisions clarifying the law on the constitutionally affirmed Aboriginal rights, and the obligations on the Crown and proponents engaging in practices that could affect those rights.

16. Simply stated, the Crown has a duty to consult any time it has real or constructive knowledge of the potential existence of Aboriginal right or title, and contemplates conduct that might adversely affect it.[11] This duty seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.[12] The Crown may delegate the procedural aspects of consultation to proponents, but the ultimate responsibility lies with the Crown (Federal or Provincial) to ensure that the Duty to consult has been fulfilled. [13]

17. What is required to fulfill this duty will be different in each case, as the depth of consultation and potential accommodation required will be proportionate to the circumstances. Where a claim to title is weak, the Aboriginal right is limited, or the potential for infringement is minor, the duty will be at the lower end of the spectrum – this still requires consultation. Where there is a strong

[10] section 35 of the Constitution Act, 1982, being Schedule B to the Canada Act (1982) (UK) 1982, c.11.
[11] *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 [*Haida Nation*] at para 35.
[12] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*. 2017 SCC 40[*Clyde River*] at para 19.
[13] *Haida Nation* at para 35 -53.

prima facie claim, the potential infringement is highly significant or and there is a high risk of non-compensable damage, deep consultation will be required. Consultation, in many cases, will lead to accommodation to avoid irreparable harm or to minimize the effects of the infringement.[14]

18. In *Delgamuukw v British Columbia*, the court stated:

> "…even in rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation."[15]

19. As noted above, Biinjitiwaabik Zaaging Anishinaabek has a strong *prima facie* claim to unextinguished Aboriginal title which the Crown has knowledge and which the Crown, Hydro One and Nextbridge are aware of. The project will traverse the traditional lands of Biinjitiwaabik Zaaging Anishinaabek , lands which the community uses to hunt, fish, trap, harvest and engage in ceremonies.[16] Biinjitiwaabik Zaaging Anishinaabek submits that this requires a high level of consultation and accommodation to avoid irreparable harm and to minimize the effects of the infringement.

Duty to Consult and Regulatory Agencies

20. In 2017 the Supreme Court released two decisions[17] considering the duty to consult and accommodate in the context of regulatory proceedings – in those cases- proceedings at National Energy Board ("NEB"). The NEB, like the OEB, is an administrative tribunal which considers energy projects and development within its jurisdiction.

21. In *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., the court was explicit that the NEB's approval process triggered the duty to consult.[18] The Court acknowledged that the NEB is not neatly classified as "the Crown". However, the NEB acts on behalf of the Crown when making final decisions on project applications, and when a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away.[19] In *Clyde River* the Court stated that the NEB was the vehicle through which the Crown acted, and it did not matter whether the final decision on a resource project

[14] *Haida Nation* at para 43-47.
[15] *Delgamuukw v British Columbia* (1997) 153 (4th) DLR at para 168, cited in *Haida Nation* at para 40.
[16] Affidavit of Chief Hardy, sworn May 8th 2018, EB-2017-0364.
[17] *Clyde River*; and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2017 SCC 41.
[18] *Clyde River* at para 27.
[19] *Clyde River* at para 29.

was cabinet or the NEB. In either case, the decision would constitute a Crown action that may trigger the duty to consult.[20]

22. The Supreme Court stated that the NEB's action in making final decisions in respect of the seismic testing at issue in that case clearly constituted Crown action. Biinjitiwaabik Zaaging Anishinaabek submits that the OEB's granting of a leave to construct application to build a transmission line through the traditional territory of Biinjitiwaabik Zaaging Anishinaabek, and which will affect at least 18 Indigenous communities, would also constitute Crown action that would trigger the duty to consult and accommodate.

23. The NEB and the OEB's decision-making processes are comparable. The OEB exercises decision-making powers as authorized by the Ontario legislature in the *Ontario Energy Board Act*. In the context of the competing s.92 applications, the decision of the Board is a final decision on the development of a project that will affect the rights, title and interests of 18 identified Indigenous groups. The OEB's decision in these combined proceedings clearly constitute a Crown action that triggers the duty to consult and accommodate.

Consultation by Proponents and the OEB

24. In *Clyde River* the Supreme Court *rejected* the decision of the Federal Court of Appeal who had determined that NEB's decisions would comply with S.35(1) of the Constitution as long as the NEB ensured proponents 'engaged in a dialogue' with the potentially affected Indigenous groups.[21] The Court stated if *the duty is triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate*:

> "Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval. Where the Crown's duty to consult with respect to a project under *Canada Oil and Gas Operations Act* (COAGA) remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question."[22]

25. With respect to the competing leave to construct applications at issue in these proceedings, the OEB is the final decision maker. While consultations obligations may continue after the leave to construct application is granted, approving a Section 92 decision is a final decision. This

[20] *Clyde River* at para 29.
[21] *Clyde River* at, para 39.
[22] *Clyde River* at para 39.

decision will not comply with s.35(1) of the Constitution unless Crown consultation has been adequate. This duty must be fulfilled *prior* to the action that could adversely affect the right in question.

26. Biinjitiwaabik Zaaging Anishinaabek submits that the evidence in these proceedings has been that neither party has satisfied the consultation obligations of the Crown and fulfilled meaningful consultation with appropriate accommodation.[23] The Board must ensure that the duty to consult and accommodate is fulfilled in granting leave to construct to either proponent and only way that may be done at this stage is by way of a conditional order.

The Board's Jurisdiction:

27. In its July 19th 2018 decision on Nextbridge's Motion, the Board referred to a 2012 Board decision EB 2012-0082 where the Board had previously determined that it did not have the jurisdiction to consult or assess Crown consultation. Biinjitiwaabik Zaaging Anishinaabek submits that that this previous determination has been overruled by the Supreme Court of Canada in *Clyde River*.

28. In EB-2012-0082, the Board determined that it did not have the power to decide Constitutional issues in s.92 applications because s.92 of the OEB Act placed strict parameters on what could be considered. As such it could not conduct consultation nor assess the adequacy of consultation. In making this determination the Board relied on the Supreme Court of Canada's decision in *Rio Tinto v Alcan Inc. v Carrier Sekani Tribal Council* (2010): "The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power"[24].

29. At the October 4th, 2018 hearing, the Board commented on Biinjitiwaabik Zaaging Anishinaabek's questioning of Hydro One with respect to whether Biinjitiwaabik Zaaging Anishinaabek would be offered equity in the Lake Superior Link Project. Specifically, the Board stated:

> "I understand your concern, but our concern here is with respect to leave to construct. And the Board is not going to—it is not before us whether or not equity participation is offered to certain groups. It is relevant to us as we consider what we can consider – so delays and costs."[25]

[23] Affidavit of Chief Melvin Hardy, May 8th 2018 EB-2017-0364; and May 17 2018 Technical Conference Transcript, EB-2017-0364, pages 9-12.
[24] Decision and Order, EB-2012-0082, November 8, 2012
[25] Hearing Transcript Volume 3, October 4, 2018, at p. 81.

30. Biinjitiwaabik Zaaging Anishinaabek submits that, in light of the *Clyde River* decision, the Board must ensure that the duty to consult and accommodate is fulfilled when making its decision in the competing Section 92 applications. Either by ensuring that consultation and accommodation by the proponents has been adequate, or by engaging in consultation. This will require an assessment of the adequacy of consultation and accommodation. One such consideration is why a community like Biinjitiwaabik Zaaging Anishinaabek, who has an outstanding Aboriginal title claim, is not being, or has not been, offered equity in either of the projects.

31. Biinjitiwaabik Zaaging Anishinaabek does not dispute that on the face of the legislation the *OEB Act* is not explicitly required to consider consultation with Aboriginal peoples in determining s.92 applications. However, the Supreme Court of Canada says that the Board has to consider this. In *Clyde River*, the Court noted that while the NEB and the *COAGA* predated judicial recognition of the Crown's duty to consult, the NEB processes could still fulfill the duty if they allowed for appropriate consultation. [26] For example, the National Energy Board could impose preconditions to approval.

32. Biinjitiwaabik Zaaging Anishinaabek submits that while section 92 of the *OEB Act* does not specifically provide that the adequacy of the duty to consult as a metric to be considered in leave to construct applications, the OEB should still fulfill that duty by exercising the powers it does have to ensure consultation is fulfilled.

33. Specifically, the Board has the power to make conditions on Leave to Construct Applications under Section 23 of the *OEB Act*. HONI, in fact, was initially proposing this when it filed its application for leave to construct and suggested that leave be granted to it with a condition that it must consult Indigenous communities in a 45-day window afterward.[27] Nextbridge never asserted that this was outside the jurisdiction of the Board but did take issue with the 45- day time frame that was proposed and maintained that it was not adequate. By making the approval conditional on the chosen proponent to engage in meaningful consultation, and to provide adequate and appropriate accommodation to Biinjitiwaabik Zaaging Anishinaabek, the Board can protect its decision from judicial scrutiny.

34. In summary, the Board's decision on the respective applications will impact the rights and interests by at least 18 Indigenous communities. The Supreme Court of Canada jurisprudence requires the OEB to consider the adequacy of the consultation and accommodation that has been afforded irrespective of what the enabling legislation states because the OEB decision will be conduct that triggers the duty to consult and accommodate.

[26] *Clyde River* at para 31
[27] HONI Leave to Construct Application EB-2017-0364 Exhibit B, Tab 7, Schedule 1.

35. Biinjitiwaabik Zaaging Anishinaabek submits that the Board cannot rely on the EB-2012-0082 decision to conclude that it does not have jurisdiction to consider the adequacy, or to conduct, consultation. The Supreme Court in *Clyde River* was clear that a decision made on the basis of inadequate consultation should be quashed on judicial review. If the Board does not ensure adequate consultation and accommodation of Indigenous communities in making its determination the decision open to review.

36. Throughout these proceedings both proponents have submitted evidence on their Indigenous consultation efforts. Both Hydro One and Nextbridge have included Indigenous Consultation as part of their applications and have submitted evidence of their consultation plans and consultation records throughout the proceedings to bolster the attractiveness of their respective Leave to Construct Applications. They have acknowledged by their actions that the adequacy of consultation and accommodation is a relevant consideration of the Board in making a decision to award a contract.

37. The Board has assumed jurisdiction over the issue of the adequacy of Indigenous consultation and accommodation in that it has granted intervenor status to several First Nation and Metis groups to participate in these proceedings. Furthermore, the Board included Indigenous Consultation as an issue to be addressed in the designation phase of this project and more recently at the Motion brought by Nextbridge to dismiss HONI's application in EB-2017-0364.[28]

38. By inviting and hearing submissions concerning Indigenous consultation in these proceedings, Biinjitiwaabik Zaaging Anishinaabek submits that the Board has assumed jurisdiction to determine and adjudicate these issues. It is respectfully submitted that all of the evidence concerning the efforts that have been made by the proponents and the Indigenous intervenors in these proceedings concerning the consultation activities is essentially rendered meaningless if the Board will not consider the adequacy of Indigenous consultation and accommodation in determining the s.92 applications before it.

Section 92

39. Section 96(2) of the *OEB Act* states:

> "(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

[28] Notice of Hearing, Motion, EB-2817-0364 April 6, 2018.

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16."

40. The Supreme Court in *Clyde River* was clear:

> "Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. **Where challenged, it should be quashed on judicial review."**[29]

41. Biinjitiwaabik Zaaging Anishinaabek is one of several intervenors in these proceedings who have decried the inadequacy of consultation by one or both of the proponents to date.

42. Nextbridge has even stated in its evidence at the development cost hearing in July 2018 that it is in the rate payers' best interests to ensure that Indigenous communities are adequately consulted and accommodated as it minimizes the risks of appeals to the courts over such issues. Judicial review proceedings such as the Pic River Appeal are not in the rate payers best interest as they could be more expensive and can delay the project. [30] This would only prolong the transmission line project and increase the cost to the ratepayers. The IESO has stated that in-service delays beyond 2020 will require using interim measures to manage energy needs and will result in additional costs and increased risks to system liability.[31]

43. The court in Clyde River stated: "*True reconciliation, is rarely, if ever achieved in courtrooms. Adequate Crown consultation before the project is always preferable to the after-the-fact judicial remonstration following the adversarial process*". [32]

Consultation and Accommodation to Date

Below is a summary of the consultation efforts of each respective proponent with Biinjitiwaabik Zaaging Anishinaabek to date. Biinjitiwaabik Zaaging Anishinaabek submits that these efforts have not been sufficient to discharge the Crown's duty and therefore a conditional order requiring further consultation with, and accommodation for, Biinjitiwaabik Zaaging Anishinaabek is justified.

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[29] *Clyde River* at para 24
[30] Development Costs Hearing Transcript, July 5, 2018 of Oral Hearing [EB-2017-0182/EB-2017-0194] pg. 130
[31] Addendum to the 2017 Updated Assessment for EWT Need, filed July 26, 2018.
[32] *Clyde River* at para 24.

Nextbridge

44. On December 19, 2013, shortly after Nextbridge received its designation to design the transmission project, and prior to Nextbridge completing its Consultation Plan for the Ministry of Energy, the Biinjitiwaabik Zaaging Anishinaabek Chief and council asserted at a meeting with Nextbridge officials that it was "*interested in potential economic opportunities from the Project*"[33].

45. Biinjitiwaabik Zaaging Anishinaabek has engaged in consultations with Nextbridge on the environmental assessment process for the project. However, Biinjitiwaabik Zaaging Anishinaabek has only been consulted by Nextbridge on the potential economic participation and other accommodation measures to a very limited extent.[34]

46. More recently, on May 9, 2018, Chief Melvin Hardy of Biinjitiwaabik Zaaging Anishinaabek had a meeting with Nextbridge officials where he expressed his concern and desire for economic participation opportunities in the project[35].

47. On September 19, 2018, a follow up meeting was held with Biinjitiwaabik Zaaging Anishinaabek and Nextbridge where Chief Hardy clearly expressed his frustration with the lack of economic participation benefits that were being offered to his community. In particular, the Chief expressed his dissatisfaction that no equity was being offered to his community[36].

48. Nextbridge maintains that it only has been delegated the procedural aspects of the Crown's duty to consult. Nextbridge maintains that the Crown has withheld the obligation or ability to discuss possible accommodation measure. Nextbridge relies on an MOU with the Ministry of Energy for its authority on this position it has taken.[37] However, when one examines the MOU it clearly states in paragraph 4 that Nextbridge is to explore accommodation measures where it states:

> RESPONSIBILITIES OF NEXTBRIDGE
>
> (h) offering Aboriginal Communities reasonable assistance, including financial assistance where appropriate and as determined by Nextbridge, to participate in consultation on the Project;

[33] Exhibit K2.3, Additional page to BZA Nextbridge Cross-examination compendium.
[34] Hearing Transcript Volume 5, October 10, 2018 p. 71
[35] Exhibit K2.2, BZA Nextbridge Cross-examination compendium, p. 7-9
[36] Exhibit K2.2, BZA Nextbridge Cross-examination compendium, p. 10-13
[37] Hearing Transcript Volume 5, October 10, 2018 p 79

(j) where appropriate, *discussing with Aboriginal Communities accommodation*, including mitigation, of potential adverse effects of the Project on their Section 35 Rights;

(k) where appropriate, *developing and proposing appropriate accommodation measures,* in consultation with the Crown;[38]

49. The evidence of Nextbridge is that the economic participation benefits that it has offered are not to be considered as "accommodation" measures, as the Crown would handle the accommodation issue. Based on Nextbridge's position the OEB has no evidence of any accommodation measures before it to assess, as Nextbridge has only provided evidence concerning economic participation which is not to be construed as an accommodation measures. Nextbridge was very assertive on this point in cross-examination and clearly deferred this issue to the Ministry of Energy.

50. Notwithstanding its position that it does not have any duty to accommodate the First Nations, Nextbridge has nevertheless offered equity participation:

a. By offering six First Nation communities through their commercial entity the Bamkushwada Limited Partnership ("BLP") equity in the project, and was prepared to offer the same as early as January 2014 when it submitted its consultation and participation plan to the Ministry of Energy;

b. offering the Metis Nation of Ontario equity and has entered into an agreement with them to that effect; and

c. providing Supercom, which is a subsidiary of BLP[39], an exclusive right to certain contracting and employment opportunities from the construction of the project.[40] Nextbridge confirmed that it has instructed its general contractor Valard by way of their agreement to honour this commitment.[41] No such commitment was made to accommodate the interests of Biinjitiwaabik Zaaging Anishinaabek. In fact, Biinjitiwaabik

[38]MOU between the MOE and Nextbridge executed November 4th 2013, included as Appendix A to the Aboriginal Consultation Plan for the East-West Tie Transmission Project, Schedule D to the January 22, 2014 Monthly Report filed in EB-2011-0140 (The designation proceedings).
[39] Hearing Transcript Volume 5, October 10, 2018 p. 74
[40] Hearing Transcript Volume 5, October 10, 2018 p. 77
[41] Hearing Transcript Volume 5, October 10, 2018 p. 77

Zaaging Anishinaabek must go through Supercom to get at these opportunities and may not contract directly with Valard.[42]

51. Biinjitiwaabik Zaaging Anishinaabek is neither a partner in the BLP and is not a shareholder of Supercom.

52. Nextbridge is also not a partner in BLP and is not a shareholder of Supercom.[43]

53. Nextbridge confirmed that it was a strategic business decision to only offer equity to the BLP communities as their communities are immediately adjacent to the transmission corridor. [44]

54. Nextbridge has decided not to offer any equity participation benefits to Biinjitiwaabik Zaaging Anishinaabek and has maintained that it will not be offering any equity participation to Biinjitiwaabik Zaaging Anishinaabek. They have decided to exclude the Biinjitiwaabik Zaaging Anishinaabek from this lucrative accommodation measure which will be a benefit to the communities who have an equity interest long after the construction of the transmission line as they will be co-owners of the assets.

55. Rather, Nextbridge alleges that it will be offering limited participation benefits to Biinjitiwaabik Zaaging Anishinaabek through Supercom during the construction phase. There are apparent problems with this plan to address Biinjitiwaabik Zaaging Anishinaabek's accommodation request, namely:

    a. Nextbridge has been delegated the procedural aspects from the Crown to consult - not Supercom. Nextbridge is effectively delegating the duty to consult and there is nothing in the evidential records which suggest that Nextbridge has the authority to do. Further, SuperCom is comprised of 6 First Nation's whose interests in awarding employment and procurement contracts is in a direct conflict of interest with Biinjitiwaabik Zaaging Anishinaabek. Chief Hardy has voiced his concern about his community being left out.

    b. Nextbridge has no way to enforce and require Supercom to accommodate infringements on Biinjitiwaabik Zaaging Anishinaabek 's interests. Rather, Biinjitiwaabik Zaaging Anishinaabek is being offer an opportunity, not an exclusive guarantee, to bid on the procurement opportunities with all the other non-BLP communities that remain after the BLP, and likely MNO, communities have had their pick. Nextbridge advises that the value

[42] Hearing Transcript Volume 5, October 10, 2018 p. 88
[43] Hearing Transcript Volume 5, October 10, 2018 p. 74
[44] Hearing Transcript Volume 5, October 10, 2018 p. 86

of this remaining contracting opportunities is merely $60 million[45] of the estimated $599 million[46] of the construction cost budget allocated to engineering, design and procurement, environmental approval, monitoring and mitigation, site clearing and access, construction and remediation.

Consultation with HONI

56. Consultation with HONI has only recently begun. However, HONI has committed to consulting with Biinjitiwaabik Zaaging Anishinaabek and the other Indigenous communities even after, if it were to be awarded Leave to Construct.

57. Unlike Nextbridge, HONI has not definitively stated that Biinjitiwaabik Zaaging Anishinaabek is not going to be offered any equity in its project. HONI advises that it needs to consult with the First Nation to get a better understanding of Biinjitiwaabik Zaaging Anishinaabek 's interests before it can decide what consultation and accommodation may be appropriate.

58. HONI has started to negotiate Capacity Funding Agreements with various Indigenous communities and is in the process of negotiating an agreement with Biinjitiwaabik Zaaging Anishinaabek.

59. In terms of contracting and procurement economic participation opportunities in the building of the transmission line, HONI's contract with its general contractor, SNC Lavalin, is not restrictive like the one that has been entered between Nextbridge and Valard. Rather, the HONI- SNC Lavalin contract imposes a general obligation to offer opportunities:

"to qualified community members of and businesses owned or controlled by First Nation and Métis communities where reasonable, and report such contracting to the owner"[47].

60. The HONI-SNC-Lavalin contract and proposed framework for Indigenous participation is significantly different in terms of economic participation for indigenous communities in that:

    a. It does not restrict Biinjitiwaabik Zaaging Anishinaabek's ability to obtain contracts directly with the general contractor, as the Nextbridge and Valard contract framework which requires Biinjitiwaabik Zaaging Anishinaabek to use Supercom as a mandatory intermediary and not seek contracting opportunities directly with Valard;

[45] Hearing Transcript Volume 5, October 10, 2018 p. 77.
[46] OEB Staff Summary of Evidence of Costs filed October 4, 2018.
[47] Hearing Transcript Volume 3, October 4, 2018 p.85; HONI and Exhibit JT2.22, SNC Lavalin Contract, article 6.8

b. the contracting opportunities available to the non-BLP First Nation to bid on are not restricted to merely $60 million; and

c. HONI is not proposing to further delegate its delegated duty from the Crown to consult and explore participation opportunities with Indigenous communities through Supercom, as Nextbridge is proposing and is currently doing.

61. Rather, the evidence of HONI under cross-examination of its indigenous participation language as contained in its contract with SNC Lavalin is as summarized as follows:

> MR. SPENCER: This may be the only contractual reference, but this is the spirit of the relationship between Hydro One and SNC-Lavalin.
>
> I think we have testified and in written evidence and testimony and interrogatories our intention is certainly to maximize local Indigenous hiring.
>
> And to be frank, it is an absolute benefit for the project as much as it is for the communities and the individuals that get that benefit of employment during the phase ever the contract.
>
> So again, we're absolutely committed. Perhaps this isn't the right clause we would actually want to detail out in a contractual obligation, because my view personally is that the nature of the relationship between us and SNC- Lavalin and then how they draw upon the skilled and qualified labour from the areas is not something we can write in black and white in a contract.[48]

62. HONI has also started to consult with Biinjitiwaabik Zaaging Anishinaabek on its environmental activities.

Crown Monitoring

63. Nextbridge advised that it has been providing the Ministry of Environment, Conservation and Parks (MOECP) and the Ministry of Energy (MOE) with regular updates on its consultation activities.

64. However, Nextbridge has not received any formal feedback or evaluations on its consultation activities.

[48] Hearing Transcript Volume 3, October 4, 2018 p, 86

65. HONI on the other hand, has not been requested by the Crown to provide any updates on its consultation activities. HONI's consultation activities have not been evaluated either.[49]

Conclusion

66. In summary, the Biinjitiwaabik Zaaging Anishinaabek submits that the OEB has the jurisdiction and is required by the recent Supreme Court of Canada jurisprudence to consider the adequacy of indigenous consultation and accommodation.

67. In this proceeding there is clear issues with the adequacy of consultation as raised by many indigenous communities and in particular the Biinjitiwaabik Zaaging Anishinaabek.

68. A mechanism that is available to the OEB to assist it in fulfilling its constitutional duty to ensure that the Biinjitiwaabik Zaaging Anishinaabek have been adequately consulted and accommodated is by way of a conditional order. Given the significant issues as submitted herein with respect to consultation and accommodation to date, the Biinjitiwaabik Zaaging Anishinaabek respectfully submits and requests that this Board issue a conditional order on the successful applicant to, prior to commencement of construction, to:

    a. Consult and accommodate the interests of BZA; and
    b. Obtain the consent of the Biinjitiwaabik Zaaging Anishinaabek.

    All of which is respectfully submitted this October 31, 2018.

[49] Hearing Transcript Volume 3, October 4, 2018, p.90