

ONTARIO ENERGY BOARD
EB-2017/0182/0194/0364

BAMKUSHWADA LIMITED PARTNERSHIP
("BLP")
and
BIIGTIGONG NISHNAABEG
PAYS PLAT FIRST NATION
FORT WILLIAM FIRST NATION
PIC MOBERT FIRST NATION
RED ROCK INDIAN BAND

WRITTEN SUBMISSION OF
BLP

To:

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1. Bamkushwada Limited Partnership¹ (“BLP”) makes the following submission:
 - (a) In support of Nextbridge Infrastructure’s application for Leave to Construct (“LTC”) for the East-West Tie Project (“EWT”); and
 - (b) In opposition to Hydro One Networks Inc.’s (“HONI’s”) LTC application for the Lake Superior Link Project (“LSL”).
2. BLP filed a written submission in support of Nextbridge’s motion to dismiss HONI’s LTC application.² That submission is just as relevant to the decision currently before the Ontario Energy Board (“OEB”), and BLP relies on it here. This submission supplements the Motion submission with the evidence and argument filed since the Motion was dismissed on July 19, 2018.

1) OVERVIEW

3. The basis of this submission, as it was for the Motion, is that Nextbridge has already met all or most of the duty to consult and accommodate (the “Duty”) the BLP First Nations, and HONI has met none of it.
4. The Duty must be met fully before the first shovel digs into the ground to construct the project.³ This is the law. No Crown or tribunal can shirk or breach this law.
5. The Crown relies on the process leading up to LTC to fulfill the Duty in part. The Duty places two obligations on the OEB:
 - (a) The OEB must *not prevent or seriously impede* the Duty from being met; and
 - (b) The OEB must *assess* how meeting the Duty (by the Crown and as delegated, by the proponents) will affect the matters the OEB is required to assess in any LTC decision: prices, reliability (which in turn includes delay) and quality of electricity service.⁴
6. It is essential that the OEB consider whether the proponents have given themselves sufficient time and budgeted enough money to fulfill the Duty before they receive final project approvals.

¹ BLP’s Limited Partners are six First Nations through whose traditional territories the EWT or LSL would pass: Biigtigong Nishnaabeg, Fort William First Nation, Michipicoten First Nation, Pays Plat First Nation, Pic Moberg First Nation and Red Rock Indian Band (collectively, the “BLP First Nations”). Note that Michipicoten First Nation is participating as an intervenor in this proceeding separately from BLP.

² BLP_Argument_HONI_Hearing of Motion_20180531, filed under EB-2017-0364.

³ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] at para 39.

⁴ *Yellow Falls Power Ltd (Re)*, Appendix A at 11; *Grand Renewable Wind LP (Re)*, 2011 LNONOEB 325 at para 76. It is BLP’s understanding that the quality of electricity service and the promotion of renewable energy are not issues in this proceeding.

7. Nextbridge put the necessary time and resources into meeting the Duty. These expenditures are reflected in its estimated in-service date of December 2020 and its budget. The OEB will fulfill its mandate with respect to the Duty in granting LTC to EWT.
8. As a latecomer to this proceeding, HONI cannot match Nextbridge's in-service date. To appear to be competitive, HONI has proposed an aggressive schedule with an extremely optimistic in-service date of December 2021, and it has undercut Nextbridge's budget. Given that it is starting consultation from the beginning, the Duty cannot be met on the terms it proposes. However, the Duty is a constitutional imperative that must be met before LSL receives final approval.⁵ If the OEB grants HONI LTC, it will inevitably encounter delays and cost overruns while it puts in the time and effort to fulfill the Duty. This could take years, as was the case for Nextbridge, and for HONI itself at an earlier stage of this proceeding. Given that this is a priority transmission project, granting LTC to HONI is clearly not in the interests of consumers with respect to the price and reliability of electricity service.

2) THE OEB'S JURISDICTION TO CONSIDER THE DUTY

9. Nextbridge and HONI apply for LTC pursuant to s. 92 of the *Ontario Energy Board Act, 1998*.⁶ Section 96 enumerates the factors that the OEB must consider to determine whether a project is in the public interest, including the interests of consumers with respect to the price and reliability of electricity service. In making that determination, the OEB considers, among other things, the project's schedule, in-service date, budget, route and design.
10. The Duty is relevant to the OEB's statutory mandate. **Specifically, it requires the OEB to assess whether Nextbridge and HONI have given themselves sufficient time and budgeted enough money to fulfill the Duty before they receive final project approvals.** The time and money a project requires are critical elements of the OEB's mandate to consider the interests of consumers with respect to the price and reliability of electricity service.
11. HONI argues that the OEB "has no jurisdiction to deal with Indigenous consultation issues."⁷ That is wholly incorrect, for three reasons.
 - (a) It is true that the Crown has not delegated the authority to the OEB assess the *adequacy* of consultation; ie, to make a ruling on whether the Duty has been met or not. But that is not what BLP is saying. What the OEB does have the authority and the requirement to do, is to assess how the fulfillment of the Duty (by the

⁵ *Clyde River* at para 24.

⁶ SO 1998, c 15, Sched B [*OEB Act*].

⁷ HONI_ARGChief_20181022 at paras 7, 79, fn 45.

Crown and by Nextbridge on the one hand⁸ and HONI on the other⁹) did or will affect price and reliability (i.e. delay).¹⁰

- (b) The process leading up to and including LTC – carried out mostly by proponents but later by the OEB – must be consistent with the Duty.¹¹ The OEB’s decision-making processes must be consistent with s. 35 of the *Constitution Act, 1982* and its purpose of advancing reconciliation.¹² Because the Duty is constitutional in nature, it lies “upstream” of any statutory regime and cannot be ousted by legislation.¹³ The Duty lies on the Crown, but it can delegate aspects of the Duty to administrative tribunals such as the OEB.¹⁴ Given that the Duty must be and will be considered by the OEB in the LTC, as applies to price and reliability, the process leading to LTC including the part of it before the OEB, can be and is being relied on by the Crown to fulfill part of the Duty here.
- (c) When the Duty has not been met by the time the proponent applies for LTC – which is the case with HONI – the OEB is required to assess the application for credibility in respect of whether the proponent (as being delegated the Duty) can or would likely meet the Duty after LTC is granted. When the OEB grants LTC, it does so on the condition that its further approval is required for a “material change” to the project that occurs after LTC is first granted, including changes in the construction schedule and the imposition of additional costs that were not originally known to the OEB.¹⁵ If these changes take the project out of the ambit of the original approval, the proponent may have to reapply for LTC, in which case the OEB must reconsider whether the project is in the public interest.¹⁶ The BLP First Nations submit that if HONI is granted LTC now, this will lead to a material change in schedule and cost later required by HONI having to meet the Duty (as delegated to it by Ontario), which will necessitate a reapplication or new application – all causing further delays and costs.

- 12. LTC is not the final decision approving construction, and the Crown relies on later stages of the decision-making process to fulfill the Duty. However, that does not absolve the OEB of the requirement to fulfill those aspects of the Duty under its mandate, and to ensure that its decisions do not effectively prevent or hamper the Duty from being met.

⁸ See the MOU between the Minister of Energy and Nextbridge (November 4, 2013).

⁹ Letter from the Minister of Energy to HONI (March 2, 2018): HONI_LSLMotion_AdditionalEvidence_20180507, Appendix 9 at 1.

¹⁰ OEB, EB-2017-0364, Decision and Order (July 19, 2018) at 5.

¹¹ *Clyde River* at para 30.

¹² *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 185; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*] at para 1.

¹³ *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 106; *Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario et al*, 2011 ONSC 7708 at para 41.

¹⁴ *Rio Tinto Alcan Ltd v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55-58.

¹⁵ OEB_Filing_Req_Tx_Applications_Ch4_20140731 [*Filing Requirements*] at 3-4

¹⁶ *Filing Requirements* at 3-4; *Union Gas Ltd and Quaggiotto et al*, 1973 CanLII 781 (Div Ct), rev’d on other grounds 1973 CanLII 484 (ONCA); *Hydro One Networks Inc (Re)*, 2010 LNONOEB 365 at paras 26-28.

Conversely, the OEB cannot ignore or minimize the requirement on the Crown and proponents to meet the Duty. The OEB must therefore subject to a high degree of scrutiny any unproven and questionable assertions by proponents such as HONI in the LTC about the time and costs required to meet the Duty afterward.

3) BLP'S KNOWLEDGE OF WHAT THE DUTY REQUIRES

13. BLP is in an excellent position to realistically predict the required time and expense of meeting the Duty:
 - (a) The BLP First Nations, being Indigenous peoples, have decades of experience with the Duty;
 - (b) BLP participated with Nextbridge in fulfilling the Duty for EWT and thus has that direct experience to inform it; and
 - (c) BLP is fully aware of its capacity to engage in the carrying out of the Duty, including the limits on its time and resources.
14. LSL's schedule and budget are premised on a number of assumptions about how HONI will meet the Duty with respect to BLP. In BLP's view, these assumptions are simply not credible. Given BLP's superior knowledge, its submissions on these issues should presumptively be preferred over HONI's.

4) NEXTBRIDGE HAS ACCOUNTED FOR THE TIME AND EXPENSE OF FULFILLING THE DUTY

15. Nextbridge's anticipated in-service date of December 2020 accounts for the time and expense of meeting the Duty.
16. Nextbridge has gone to great lengths to fulfill the Duty. The OEB made it the designated transmitter on August 7, 2013 partly based on its commitment to support Indigenous consultation and participation.¹⁷ Over the five years that followed, BLP and Nextbridge painstakingly negotiated an agreement that gave BLP confidence in the EWT.¹⁸ The agreement is confidential, but among other things, it gives BLP a 20% ownership stake in EWT.¹⁹ Nextbridge has conducted an environmental assessment ("EA") for EWT and expects an approval in February 2019.²⁰
17. The agreement accommodates EWT's impacts on the BLP First Nations' Aboriginal and Treaty rights. However, it does more than that. The BLP First Nations have long seen the Crown authorize development in their traditional territories without consulting or accommodating them. They have suffered the adverse impacts of this development

¹⁷ OEB, EB-2011-0140, East-West Tie Line Designation: Phase 2 Decision and Order (August 7, 2013) at 8.

¹⁸ Affidavit of Peter Collins at para 34, Chief Collins, Transcripts, May 16, 2018, p 14, lines 4-20.

¹⁹ Chief Collins, Transcripts, May 16, 2018, p 11, lines 22-3.

²⁰ Exhibit I.Nextbridge.Staff.49 at 1.

without meaningfully sharing in its benefits. Time and time again, they have been left worse off while others profit. With agreements such as this, the BLP First Nations are increasing their decision-making authority and their financial capacity to further their self-determination.²¹ They are taking responsibility for how development occurs on their traditional territories, and are being included in the benefits that flow from it.

5) HONI HAS NOT CONSULTED WITH BLP

18. Because it submitted its application at the last moment, HONI has not consulted with the BLP First Nations and is only beginning to consult with other Indigenous parties.
19. HONI and BLP partnered with Great Lakes Power Transmission for the designation application, but when the OEB made Nextbridge the designated transmitter on August 7, 2013, that relationship came to an end.²²
20. HONI was not delegated procedural aspects of the Duty until March 2, 2018.²³ As its own records show, consultation with the BLP First Nations has been preliminary at best.²⁴ HONI's discussions with BLP mainly consisted of an abortive attempt to negotiate an accommodation agreement that would have caused BLP to violate the exclusivity clause of its agreement with Nextbridge.²⁵ HONI has only made one procedural agreement with a BLP First Nation, Biigtigong Nishnaabeg, which relates to archaeological work.²⁶ It has not established the consultation plans required for the provincial environmental assessment ("EA").²⁷
21. HONI's rushed schedule makes consultation a box-ticking exercise rather than a meaningful engagement. In a letter dated July 4, 2018, Chief Duncan Michano of Biigtigong Nishnaabeg writes:

It seems as if HONI's clock is taking precedence over everything else, including our cultural heritage and our rights. The entire HONI LSL project is within Biigtigong asserted title lands. Streamrolling across our rights and claims is something we cannot allow.²⁸

²¹ Nextbridge Exhibit KT2.1, p 12, lines 24-27.

²² Ms. Goulais, Transcripts, May 17, 2018, p 112, lines 16-28.

²³ HONI_LSLMotion_AdditionalEvidence_20180507, Attachment 9 at 1.

²⁴ See, for example, Ms Goulais, Transcripts, Volume 2, October 3, 2018, pp 9-10: "MS. GOULAIS: We've had preliminary discussions with Pays Plat as well with regards to this project. MR. CASS: So preliminary discussions is the status? MS. GOULAIS: Yes." See also HONI, Exhibit I, Tab 1, schedule 15.

²⁵ HONI_LSLMotion_AdditionalEvidence_20180507; Exhibit JT1.1 at 1.

²⁶ Ms. Goulais, Transcripts, Volume 1, October 2, 2018 pp 151-152.

²⁷ Ontario Ministry of the Environment, "Consultation in Ontario's environmental assessment process" (January 2014) at 39-55.

²⁸ HONI, Exhibit I, Tab 1, Schedule 15, Attachment 2 at 360-361. See also Chief Duncan Michano's letter to HONI dated June 22, 2018: HONI, Exhibit I, Tab 1, Schedule 15, Attachment 2 at 167-168.

22. HONI vaguely suggests that it has already consulted with the BLP First Nations because they have come into contact in the past on different matters.²⁹ If this proposition were accepted, the Crown would never have to consult with Indigenous peoples again because it has been in touch with them on various matters since the 17th or 18th Centuries.

6) HONI HAS NOT ACCOUNTED FOR THE TIME AND EXPENSE OF FULFILLING THE DUTY

23. HONI frames LSL as cheaper and not seriously delayed. It does so in large part by proposing a schedule and budget that vastly underestimate the time and expense that fulfilling the Duty will require. And HONI refuses or fails to admit this or to give details on realistic timeframes and costs.
24. HONI filed its application on February 15, 2018.³⁰ Because it is such a latecomer, it cannot match Nextbridge's in-service date of December 2020. It is in the early stages of a provincial EA. Furthermore, because LSL would pass through Pukaskwa National Park, it is also in the early stages of a federal EA.
25. HONI has attempted to counter this timing disadvantage in two ways: first by proposing, not credibly, that the delay will be only one year; and second, by proposing, again not credibly, that its costs will be lower than the EWT, thus making the delay "worth it."

a) HONI cannot obtain regulatory approvals on its proposed schedule

26. HONI's proposed in-service date of December 2021 depends on an overriding assumption that the EAs and fulfilling the Duty will be *pro forma* exercises. It makes equally doubtful assumptions that 1) it can piggyback off Nextbridge's EA approval, and 2) that the Parks Canada EA will be done in several months.

I) HONI ASSUMES THAT IT CAN PIGGYBACK OF NEXTBRIDGE'S EA

27. HONI asserts that once Nextbridge's EA is approved, it can obtain a Declaration Order waiving a provincial EA for LSL, or in the alternative, that it can carry out an Individual Assessment within months using Nextbridge's work.³¹
28. It is unlikely that HONI will be able to rely on Nextbridge's EA. If Nextbridge is not granted LTC, then there would be no reason for the Ministry of the Environment, Conservation and Parks ("MECP") to make a decision on the EWT. MECP's witnesses made it clear that, in the event that NextBridge is not granted leave to construct, s. 9 of the *Environmental Assessment Act*³² provides that the Minister may choose not to issue a

²⁹ Ms. Goulais, Transcripts, May 17, 2018, p 108, lines 1-14.

³⁰ HONI LSL Application, HONI_S92_LSL-APPL_20180215.

³¹ HONI's Response to OEB Staff IR #14, Exhibit I, Tab 1, Schedule 14, Attachment 1 at 4.

³² RSO 1990, c E.18.

decision on NextBridge's EA application.³³ In that case, Nextbridge's EA materials would not be approved. HONI would be unable to get a Declaration Order absent an approved EA, and would be unable to rely on non-approved EA materials.³⁴

29. In the unlikely event that HONI were allowed to use Nextbridge's EA materials, it would still be far from fulfilling the Duty. HONI cannot rely on Nextbridge's consultation to fulfill its requirements under the Duty and the provincial EA.³⁵ MECP will not, nor could it, grant a Declaration Order or approve an Individual EA if there were outstanding issues with consultation.³⁶ HONI will still have to conduct primary research to properly understand existing environmental conditions and inform Indigenous peoples and stakeholders about the areas where LSL would use different access routes than EWT.³⁷ It cannot use the traditional knowledge and land use studies commissioned by Nextbridge and has not yet initiated its own.³⁸ It has yet to develop the Consultation Plans required for the provincial EA, and it is far from incorporating Indigenous concerns and knowledge into the design of LSL.³⁹
30. If HONI cannot piggyback off Nextbridge's EA, by its own admission a new Individual EA could take three to five years.⁴⁰ The cost would be "approximately \$20 million in reproducing EA studies and consultation and at least two additional years added to the schedule, resulting in EA approval in summer 2021 and an in-service date of end 2023."⁴¹ Furthermore, as HONI acknowledges, "there would be incremental cost in addition to the \$20 million, probably in areas of Indigenous consultation."⁴² HONI does not account for any of the other expenses of a two-year delay.⁴³

³³ Mr. Evers, Transcripts, Volume 7, October 12, 2018, p 113, lines 9-24: "there is [*sic*] a number of factors that the Minister can consider when they -- when he makes a decision on the application, and one of those could be the leave-to-construct or the status of the leave-to-construct."

³⁴ Ms. Croll, Transcripts, Volume 2, October 3, 2018, pp 11-12, lines 26-1: "we are not able to make a declaration order request until the NextBridge individual EA has legal standing, which it does not because it is not yet approved."

³⁵ Mr. Evers, Transcripts, Volume 7, October 12, 2018, pp 112-113, lines 27-9: "It is the ministry's position that the project is a new project, and [HONI] would have to fulfill the requirements under the Environmental Assessment Act...."

³⁶ Mr. Evers, Transcripts, Volume 7, October 12, 2018, p 121, lines 7-16. See also Mr. Evers, Transcripts, Volume 7, October 12, 2018, pp 150-151, lines 20-2, 151-152, lines 26-2.

³⁷ HONI Response to OEB Staff IR # 15, Exhibit I, Tab 1, Schedule 15, Attachment 2 at 385. See also Transcripts, Volume 2, pp 17-18, 31.

³⁸ Ms Croll, Transcripts, Volume 2, p 32, lines 13-18: "We are not relying on that part of information from NextBridge's work."

³⁹ Ontario Ministry of the Environment, "Consultation in Ontario's environmental assessment process" (January 2014) at 39-55.

⁴⁰ Ms. Croll, Transcripts, Volume 2, October 3, 2018, p 17-18, lines 2-8: "So we would accept that the typical timing of an individual EA that has had no work completed previously would be three to five years."

⁴¹ HONI Response to OEB Staff IR #14, Exhibit I, Tab 1, Schedule 14 at 1.

⁴² Ms. Croll, Transcripts, Volume 2, October 3, 2018, p 111, lines 2-5.

⁴³ Ms. Croll, Transcripts, Volume 4, October 9, 2018, pp 31-34.

II) HONI ASSUMES THAT THE FEDERAL EA WILL TAKE EVEN LESS TIME THAN THE PROVINCIAL EA

31. Because the EWT route does not go through Pukaskwa National Park, HONI must conduct a federal EA from the beginning.⁴⁴ HONI nevertheless asserts that Parks Canada will complete the EA in several months and issue an approval once the provincial EA ends in August 2019.⁴⁵
32. Two of BLP's Limited Partners, Biigtigong Nishnaabeg and Pic Mobert First Nation, have active Aboriginal title claims to the Park.⁴⁶ *They do not consent to LSL going through the Park.*⁴⁷ Without this consent, HONI takes the risk that the Crown may withhold approval of LSL pending final resolution of the claims, or if LSL were approved and one or both of the claims succeed, that the Crown might have to retroactively cancel the approval.⁴⁸ The Duty with respect to these First Nations falls at the high end of the spectrum, meaning that it requires the Crown to make significant undertakings to resolve their concerns.⁴⁹
33. Parks Canada does not generally issue an approval until the Duty has been met, and HONI acknowledges that this could consequently delay LSL.⁵⁰ Parks Canada's assessment criteria require HONI to gather significant amounts of evidence that does not currently exist, including direct, indirect and cumulative effects on the "health and socio-economic conditions of Indigenous and non-Indigenous peoples" and the "Indigenous people's current use of land and resources for traditional purposes," and measures to address these effects and Indigenous peoples' concerns.⁵¹ Gathering this evidence will require further consultation with Indigenous groups.⁵²
34. HONI acknowledges that it will have to fund traditional knowledge and land use studies,⁵³ but does not allow enough time for these studies to be carried out properly and

⁴⁴ HONI Response to Undertaking JT 2.5 at 1; HONI Response to OEB Staff IR #14, Exhibit I, Tab 1, Schedule 14, Attachment 1 at 1.

⁴⁵ HONI Response to OEB Staff IR #14, Exhibit I, Tab 1, Schedule 14, Attachment 1 at 2.

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 91-92.

⁴⁹ HONI Response to OEB Staff IR #11, Exhibit I, Tab 11, Schedule 1 at 5, lines 9-11: "Hydro One anticipated that the Ministry of Energy would identify the depth of consultation required for each of the 18 Indigenous communities and assumed that the 6 BLP communities would be identified as requiring deeper consultation"; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at paras 44, 47.

⁵⁰ Ms Croll, Transcripts, Volume 2, October 3, 2018, p 125, lines 9-22: "Obviously, part of the EA is consultation with Indigenous communities. It's an important part, so certainly delays in that could also impact the EA approval date, and these scenarios would be applicable to any cause for any EA approval date delay."

⁵¹ Parks Canada, "Guide to the Parks Canada Environmental Impact Analysis Process" (June 2015) at 6; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s. 5.

⁵² Canadian Environmental Assessment Agency, "Working with Aboriginal Groups during a Federal Environmental Assessment – An Example" (February 2014).

⁵³ Ms. Goulais, Transcripts, Volume 2, October 3, 2018, p 56, lines 20-25.

incorporated into the EA. Even though these studies have not yet begun, HONI claims that the studies can be completed before March 8th, 2019 for an Individual EA,⁵⁴ and around “mid-summer 2019” for the federal EA.⁵⁵ This is a massive underestimate for many reasons:

- (a) These studies require significant planning to identify study areas, assessment criteria, assessment methodologies, knowledge holders etc.;
- (b) First Nations and their members—whose time and capacity are limited—must participate extensively in the process through tasks such as interviews, focus groups and site visits;
- (c) Different parts of the studies must be conducted at different times of year to assess seasonal land use;⁵⁶
- (d) Once the studies are complete, the proponent needs time to incorporate its findings into the EA and revise the project in consultation with the First Nation; and
- (e) Parks Canada needs time to consider HONI’s application, and may require it to provide further information.

35. All this cannot be done within the timeline that HONI seeks to impose.

36. Nextbridge originally applied to route EWT through the Park, but was rejected by Parks Canada. If Parks Canada rejected HONI’s application, HONI would have to reroute LSL around the Park and revise its design and budget accordingly. This would clearly be a “material change” requiring the OEB’s approval and could easily require a new LTC proceeding. Even if HONI obtained LTC, it would still not be able to rely on NextBridge’s EA for its new route around the Park, for the reasons stated earlier.⁵⁷ The resulting cost and delay would be borne by consumers.

III) THE HUMAN COST OF DELAYING THE IN-SERVICE DATE

37. Significant time, human capital and financial resources were invested to prepare for EWT’s 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 that

⁵⁴ EB-2017-0182, 0194, 0364, Transcripts, Volume 2, pp 58, line 23.

⁵⁵ Ms Croll, Transcripts, Volume 2, October 3, 2018, p 58, line 28.

⁵⁶ Ms Goulais, Transcripts, Volume 2, October 3, 2018, p 118, lines 24-25.

⁵⁷ Mr. Evers, Transcripts, Volume 7, October 12, 2018, p 123, lines 3-7.

EWT promises. 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.⁵⁸

38. 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.⁵⁹
39. 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 once construction on EWT begins.⁶⁰ These persons, and their families, are relying on these jobs.⁶¹ 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.⁶² Many of these persons are financially poor; they do not have the savings to wait for one or more years, and pass up other employment opportunities, until LSL is ready to proceed.⁶³ 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.⁶⁴
40. Some of these 300 persons have been deeply affected by systemic racism and colonialism, which has led to despair, substance abuse, suicide attempts and other reactions to trauma.⁶⁵ EWT is a golden opportunity for them to turn their lives around. 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.⁶⁶ Momentum stalled now may have the effect of a full stop for many such persons.⁶⁷
41. No amount of money can 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.

⁵⁸ Affidavit of Peter Collins at paras 7-11; Chief Michano, Transcripts, May 16, 2018, p 25, lines 18-28, p 26, lines 1-12.

⁵⁹ Affidavit of Peter Collins at para 7.

⁶⁰ Affidavit of Peter Collins at para 7.

⁶¹ Chief Collins, Transcripts, May 16, 2018, p 22, lines 15-28, p 23, lines 1-23; Chief Desmoulins, Transcripts, May 16, 2018, p 23, lines 26-28, p 24, p 25, lines 1-9.

⁶² Chief Collins, Transcripts, May 16, 2018, p 23, lines 17-24.

⁶³ Chief Collins, Transcripts, May 16, 2018, p 22, lines 15-28, p 23, lines 1-24, p 26, lines 16-28, p 27, lines 1-13; Chief Michano, Transcripts, May 16, 2018, p 25, lines 10-28, p 26 lines 1-12.

⁶⁴ Chief Collins, Transcripts, May 16, 2018, p 10, lines 4-28, p 11, lines 1-9, p 26, lines 16-28, p 27, lines 1-13; Chief Desmoulins, Transcripts, May 16, 2018, p 25, lines 1-9; Chief Michano, Transcripts, May 16, 2018, p 25, lines 10-27.

⁶⁵ Chief Collins, Transcripts, May 16, 2018, p 22, lines 22-25, p 23, lines 17-24, p 26, lines 16-28, p 27, lines 1-13; Chief Desmoulins, Transcripts, May 16, 2018, p 7, lines 13-23, p 16, lines 9-28, p 17, p 18, lines 1-4, p 23, lines 26-28, p 24, p 25, lines 1-9; Chief Michano, Transcripts, May 16, 2018, p 25, lines 10-27.

⁶⁶ Chief Collins, Transcripts, May 16, 2018, p 26, lines 16-28, p 27, lines 1-5; Chief Desmoulins, Transcripts, May 16, 2018, p 23, lines 26-28, p 24, p 25, lines 1-9; Chief Michano, Transcripts, May 16, 2018, p 25, lines 21-27.

⁶⁷ Chief Michano, Transcripts, May 16, 2018, p 25, lines 10-27.

42. HONI acknowledged these harms and expressed its sympathy, but has made no commitment to address them.⁶⁸

IV) HONI'S SELF-SERVING SPIN ON THE WAWA TRANSFORMER STATION EA

43. In a letter dated October 29, 2018,⁶⁹ HONI advised that the EA of the Wawa Transmission Station expansion would proceed as a “full Class EA,” which presumably means the Class EA Process under *Class Environmental Assessment for Minor Transmission Facilities* (November 16, 2016). HONI assumed that the less onerous Class EA Screening Process would apply, and now estimates that the EA will be delayed. This is the first of many delays that will result from overly optimistic assumptions in HONI's schedule.
44. Even if the Wawa EA did delay EWT's in-service date—which is no more than a remote possibility—it would not delay Nextbridge's construction schedule. If Nextbridge is granted LTC, it can start construction on EWT after it receives its EA in or around February 2019. This is extremely important for the BLP First Nations to benefit from BLP's contracting opportunities and their attendant economic and social benefits.
45. HONI attempts to spin this development by claiming that Nextbridge cannot make its December 2020 in-service date, but it may still make its December 2021 in-service date. This is purely self-serving speculation. As HONI acknowledges, it cannot predict how long the EA will take, and MECP, the decision-maker, has indicated that there will be ways to expedite the process. There is no evidence to support HONI's claim except its bald, uncorroborated assertion that a full Class EA “normally takes 12-18 months for completion.” HONI appears to see no contradiction in suggesting on one hand that the Class EA could drag on as long as possible, and on the other hand that LSL will race through a provincial Individual Assessment and a federal EA for LSL in half that time or less.

b) HONI has vastly underestimated the expense of accommodating BLP

I) HONI HAS BUDGETED ALMOST NOTHING FOR INDIGENOUS CONTRACTING OPPORTUNITIES

46. Business contracting opportunities (and the financial return from them) are a significant part of BLP's agreement with Nextbridge. HONI has given no explicit indication that this would be part of any financial accommodation to BLP. All that HONI does provide is a budget of \$18.45 million for one type of business contract: site clearing, preparation and

⁶⁸ Ms. Goulais, Transcripts, May 17, 2018, p 108, lines 15-28, p 109, lines 1-24; HONI Response to BZA IR #9, Exhibit I, Tab 9, Schedule 9 at 1-2.

⁶⁹ HONI_LTR_EWT_LSL_20181029.

site remediation.⁷⁰ And this is for participation (or the opportunity for participation) of *all* Indigenous communities potentially affected by LSL (not just to BLP First Nations, which are 6 of the 18 Indigenous peoples on Ontario's consultation list).

47. In contrast, Nextbridge has budgeted approximately \$60 million in construction contracting opportunities for Indigenous peoples **other** than the BLP First Nations.⁷¹ While the value of BLP's contracting opportunities with Nextbridge is confidential, given the evidence from Nextbridge about the priority importance it has placed on providing financial accommodation/participation to BLP First Nations, it is reasonable to assume that the value of business contracting being provided or offered by Nextbridge, to the BLP First Nations, is higher than \$60 million.

II) HONI'S EQUITY OFFER IS NOT A CREDIBLE ACCOMMODATION MEASURE

48. HONI estimates that it can negotiate an agreement in principle with BLP in the order of 45 days after being granted LTC.⁷² This is an absurdly short amount of time. It took BLP five years to negotiate its agreement with Nextbridge, and three years to get HONI to agree to an outline of an agreement for the designation application.⁷³ HONI claims it can achieve this Herculean feat by offering BLP 34% equity in LSL, which is presumably so generous of an offer that BLP could not conceivably refuse.⁷⁴ HONI argues that this is so because BLP's agreement with Nextbridge provides less than 34% equity for BLP: 20% in fact.⁷⁵ However, by its own admission, HONI has not seen this agreement and has no idea what its total value is.⁷⁶
49. HONI's attempt to compare the existing confidential agreement between BLP and Nextbridge, with a hypothetical nonexistent agreement between BLP and HONI, is meaningless. HONI does not have knowledge to make any such comparison. Agreements of this kind are complicated and commercially valuable in many different ways. For example, HONI fails to note that BLP's agreement with Nextbridge includes substantial contracting opportunities.

⁷⁰ HONI Response to OEB Staff IR #10, Exhibit I, Tab 1, Schedule 10 at 5; Mr. Karunakaran, Transcripts, Volume 3, October 4, 2018, p 57, lines 7-28, p 58, lines 1-24, p 60, lines 9-28; Mr. Spencer, Transcripts, Volume 3, October 4, 2018, p 58, lines 25-28, p 59, lines 1-18.

⁷¹ Ms. Tidmarsh, Transcripts, Volume 5, October 10, 2018, p 77, lines 14-24; It is incorrect that Nextbridge has only budgeted \$7 million for First Nations and Métis in the construction phase of EWT, which is the number cited in HONI's Argument in Chief at para 143.

⁷² HONI LSL Application, Exhibit B, Tab 1, Schedule 1, p 11-12, lines 24-3; HONI Response to OEB Staff IR #15, Exhibit I, Tab 1, Schedule 15 at 3; HONI Response to Nextbridge IR #35, Exhibit I, Schedule 35 at 2; Ms. Goulais, Transcripts, Volume 1, October 2, 2018, p 145, lines 7-22, p 152-153, lines 20-27; Mr. Spencer, Transcripts, Volume 1, October 2, 2018, p 146-147, lines 27-24.

⁷³ Nextbridge Response to Undertaking KT 2.1, p 12, lines 27-37; Affidavit of Peter Collins at para 34, Chief Collins, Transcripts, May 16, 2018, p 14, lines 4-20; Ms. Goulais, Transcripts, Volume 3, October 4, 2018, p 4, lines 1-8.

⁷⁴ HONI Argument in Chief at para 55, HONI_LSLMotion_AdditionalEvidence_20180507, Attachment 12 at 2.

⁷⁵ HONI Argument in Chief at para 55, HONI_LSLMotion_AdditionalEvidence_20180507, Attachment 12 at 3, Mr. Spencer, Transcripts, Volume 3, October 4, 2018, p 6, lines 14-19.

⁷⁶ Ms. Goulais, Transcripts, May 17, 2018, p 103, lines 25-28.

50. In an act of obvious disingenuous desperation, HONI blames Nextbridge and BLP's legal counsel for "preventing" or "forbidding" BLP from negotiating with HONI (as a result of the confidentiality and exclusivity clauses), which it assumes BLP wants to do.⁷⁷ This is ironic given that HONI itself had an exclusivity provision in its agreement with BLP for the designated transmitter application.⁷⁸ HONI represents BLP and BLP First Nations as unknowing patsies at the hands of Nextbridge and the BLP lawyers. This patronizing attitude is the antithesis of the business relationship BLP is looking for. HONI makes attempt to explain the paradox of why, if BLP really was eager to jump ship from its "Nextbridge and legal counsel masters," it would intervene in this proceeding and strenuously oppose HONI's application. Chief Desmoulin testified:

And here we are, we've done it, and again you bring us back to the table again to say, Well, there's HONI now -- we were looking at HONI now, and come back to the table. We are so much forever in pawns, but like I said, I'm not prepared to, you know, to be another pawn.⁷⁹

51. HONI has not committed that it will require or achieve an accommodation agreement with BLP as a condition of it proceeding with LSL construction. It has only committed to make "best efforts."⁸⁰ HONI made it abundantly clear that LSL's construction schedule would not budge, even if it cannot negotiate an economic participation agreement with BLP in time.⁸¹ Given the highly compressed timeline, the only reasonable conclusion is that HONI will essentially be making a "take it or leave it" offer. If BLP rejects it, then it will not be economically accommodated at all. And the relationship with HONI would be damaged by this kind of approach and result, perhaps irreparably so. HONI has suggested that it can always negotiate an agreement with BLP after construction starts.⁸² This would not fulfill the Duty, which must occur *before* LSL is finally approved. Furthermore, given that LSL would be a *fait accompli*, HONI would only be motivated to negotiate such an agreement by largesse.

7) POLICY IMPLICATIONS

52. The ultimate purpose of the Duty is reconciliation. Reconciliation has two meanings. First, it means reconciling the "respective claims, interests and ambitions" of Indigenous and non-Indigenous peoples.⁸³ EWT is an opportunity for the BLP First Nations to

⁷⁷ HONI Argument in Chief at paras 24, 80; HONI response to BZA IR #7, Exhibit I, Tab 9, Schedule 7 at 2; Ms. Goulais, Transcript, Volume 1, October 2, 2018, p 145, lines 7-22; Mr. Spencer, Transcript, Volume 3, October 4, 2018, p 5-6, lines 23-2.

⁷⁸ HONI Response to Undertaking JT 2.10.

⁷⁹ Chief Desmoulin, Transcripts, May 16, 2018, p 17, lines 20-24.

⁸⁰ HONI Response to Nextbridge IR #35, Exhibit I, Tab 2, Schedule 35 at 2.

⁸¹ Ms Goulais, Transcripts, Volume 3, October 4, 2018, pp 8-10.

⁸² HONI Argument in Chief at para 81; HONI Response to BLP IR #1, Exhibit I, Tab 3, Schedule 1 at 1-2.

⁸³ *Mikisew Cree* at para 1.

exercise their right to self-determining by benefiting from the use of their traditional territories on terms that they have negotiated and approved.⁸⁴ LSL is not.

53. Reconciliation also means reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁸⁵ The OEB’s authority to exercise its jurisdiction over the lands of Ontario is rooted in the relationship between Indigenous peoples and the Crown that enabled the peaceful settlement of Canada.⁸⁶ Implicit in this authority is the responsibility to exercise its powers honourably with respect to Indigenous peoples.⁸⁷ The OEB must choose between proponents that have taken fundamentally different approaches to the Duty. Nextbridge made a sustained, respectful commitment to build a partnership with BLP. HONI has proceeded on the assumption that it can buy BLP off without any need to build a respectful relationship. Nextbridge has the support of many Indigenous communities. HONI has the support of none.⁸⁸
54. The OEB’s decision will send a message to proponents and Indigenous peoples about the value it places on the Duty. This message will set the stage for future development. In BLP’s submission, EWT represents the better path.

⁸⁴ Nextbridge Reponse to Undertaking KT2.1, p 12, lines 24-27.

⁸⁵ *Haida Nation* at para 20.

⁸⁶ *Simon v The Queen*, [1985] 2 SCR 387 at para 49; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 79.

⁸⁷ *Haida Nation* at paras 17, 32.

⁸⁸ HONI Response to OEB Staff IR #15, Exhibit I, Tab 1, Schedule 15 at 4.