DEMARCO ALLAN LLP

Jonathan McGillivray
Associate
Bay Adelaide Centre
333 Bay Street, Suite 625
Toronto, ON M5H 2R2
TEL +1.647.208.2677
FAX +1.888.734.9459
jonathan@demarcoallan.com

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

Dear Ms. Walli:

Re: Enbridge Gas Inc. Application for Leave to Construct a Natural Gas Pipeline in the Municipality of Chatham-Kent
Board File No.: EB-2018-0188

We are counsel to Anwaatin Inc. (**Anwaatin**). Please find enclosed Anwaatin's written submissions in the above-noted proceeding, filed pursuant to Procedural Order. No. 1.

Sincerely,

Jonathan McGillivray

c. W.T. (Bill) Wachsmuth, Enbridge Gas Inc.
R. K. Joe Miskokomon, Deputy Grand Council Chief, Anishinabek Nation
Larry Sault, Anwaatin Inc.
Don Richardson, Shared Value Solutions Ltd.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an application by Enbridge Gas Inc. for an order granting leave to construct a natural gas pipeline and ancillary facilities in the Municipality of Chatham-Kent.

EB-2018-0188

SUBMISSIONS OF

ANWAATIN INC.

May 24, 2019

INTRODUCTION AND OVERVIEW

1. We are counsel to Anwaatin Inc. (**Anwaatin**) in the Ontario Energy Board EB-2018-0188 proceeding to review Enbridge Gas Inc.'s (**Enbridge's**) application for an order granting leave to construct a natural gas pipeline and ancillary facilities in the Municipality of Chatham-Kent (the **Municipality** or **Chatham-Kent**) under section 90(1) of the *Ontario Energy Board Act* (the **Act**) and approval of a Temporary Land-Use Agreement pursuant to section 97 of the Act (collectively, the **Application**).

2. Anwaatin is a collective of Indigenous communities, including the Chippewas of the Thames First Nation, Kettle and Stony Point First Nation, Aamjiwnaang First Nation, Walpole Island First Nation, Caldwell First Nation (the **Southwest Region First Nations**) and Aroland First Nation. Anwaatin is generally focused on: (i) ensuring that Indigenous rightsholders have been meaningfully consulted and accommodated; (ii) alleviating energy poverty and achieving reliable, affordable, and sustainable energy for its member Indigenous communities; and (iii) ensuring that the land, water, and broader environment are sustainably managed in a manner that reflects stewardship for seven generations. Schedule A of the Application indicates that both the Bear Line and Base Line elements of the proposed natural gas pipeline extension impact and cover the territories of the Southwest Region First Nations.

3. Anwaatin expressly rejects the assertion that the Crown and/or its delegate, Enbridge, has discharged its duty to meaningfully consult and accommodate First Nations rightsholders impacted by the Application. In fact, Enbridge's evidence confirms that virtually all of the affected First Nations were expressly informed by Enbridge and/or Union Gas Limited (**Union**) that the project was on hold and there was no further consultation when the decision to proceed was made and the Application was filed.[1]

4. Anwaatin therefore requests that the Board deny, delay or defer its further consideration and/or approval of the Application until the Crown's duty to meaningfully consult and accommodate impacted Indigenous rightsholders has been fully discharged in accordance with the inherent and constitutional rights of Indigenous peoples and the laws of Canada.

[1] EB-2018-0188, Exhibit B.Anwaatin.5, page 1.

5. In addition, and subject to the outcome of full and meaningful consultation, Anwaatin requests that the Board make any potential approval of the Application conditional upon the express conditions set out in paragraph 24, below.

SUBMISSIONS

I. The Crown's duty to consult meaningfully with, and accommodate, Indigenous rightsholders affected by the Application has not been discharged.

6. The Board is being asked in this Application to consider, pursuant to sections 90 and 97 of the Act, whether to approve expansions to the Bear Line and Base Line portions of the Chatham-Kent natural gas pipeline, and whether the expansion is consistent with the Board's broader public interest mandate as set out in section 2 of the Act. We note that neither the original Chatham-Kent pipeline nor the proposed expansion has been the subject of any express easement, agreement, or other arrangement with the Indigenous rightsholders of and on the territory. There has been no free, prior, and informed consent for any aspect of the original pipeline, or the expansions set out in the Application. Similarly, there appears to have been no Indigenous consultation or involvement in the August 23, 2005 Certificate of Public Convenience and Necessity that was granted to Union for Chatham-Kent under section 8 of the *Municipal Franchises Act*.

7. Further, Anwaatin strongly disagrees with the Ministry of Energy's (as it then was) conclusion that Union/Enbridge has discharged its duty to consult with affected Indigenous communities by simply sending certain email correspondence and PowerPoint presentations to affected communities more than a year before the Application was filed. In fact, the evidence confirms that virtually all First Nations were informed that the project was on hold and were not expressly informed that the project was proceeding prior to the March 2019 filing of the Application.[2]

8. Anwaatin submits that this is cannot be construed as meaningful consultation and is clearly antithetical to the Federal Court of Appeal's recent ruling in the judicial review of the Trans

[2] EB-2018-0188, Exhibit B.Anwaatin.5, p. 1.

Mountain pipeline[3] and the Supreme Court of Canada's (the **SCC's**) decision in *Clyde River*[4] confirming that consultation must be meaningful and not be a perfunctory exercise, as it appears to have been this Application.

9. The affected Southwest Region First Nations each have (i) constitutionally protected Aboriginal rights, title(s), and interests that may be adversely affected by Enbridge's proposed pipeline expansion, and (ii) a right to be meaningfully consulted about the pipeline expansions and the Application, and potentially accommodated.

10. Generally, government decision-makers, delegated regulators (including administrative tribunals like the Board) and many proponents have a constitutionally enshrined and judicially enforced duty to consult a given Indigenous community if the decision-maker or proponent is contemplating conduct that might adversely affect a treaty or Aboriginal right that the Indigenous community has or credibly asserts.[5] The Board itself has recognized that it has a delegated duty to consult potentially impacted Indigenous communities,[6] and particularly in relation to a leave to construct proceeding affecting Indigenous rights and territories.[7]

11. Further, the SCC has affirmed that decisions that trigger the duty to consult cannot be upheld if the duty to consult meaningfully has not been met.[8] Specifically, the SCC has held that the duty to consult, being a constitutional imperative, gives rise to a special public

[3] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].
[4] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*].
[5] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, paras 35, 64 [*Haida*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, para 31 [*Carrier Sekani*].
[6] EB-2017-0147 Enbridge Gas Distribution Inc. Fenelon Falls Pipeline Project, Ontario Energy Board Letter of Direction dated October 30, 2017, available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/588166/File/document [EB-2017-0147 Letter of Direction].
[7] EB-2017-0319 Enbridge Gas Distribution Inc. Application for the Renewable Natural Gas Enabling Program, Ontario Energy Board Decision and Order dated October 18, 2018 at pp. 24–25, available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/623591/File/document [EB-2017-0319 Decision and Order].
[8] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59 [*Chippewas*]; see also *Tsleil-Waututh*.

interest that supersedes other concerns typically considered by tribunals required to act in the public interest.[9]

12. Similarly, the SCC has ruled that the duty to consult particularly applies to projects, decisions and conduct that have an immediate impact on land and resources, and also extends to strategic, higher level decisions affecting Aboriginal lands, rights, and treaties.[10]

13. Anwaatin respectfully submits that honouring the duty to consult is critical as the duty seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.[11] It has both a constitutional and a legal dimension.[12] Its constitutional dimension is grounded in the honour of the Crown.[13] This principle is in turn enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights.[14] And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples.[15]

14. The honour of the Crown requires a meaningful, good faith consultation process. Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying.[16]

15. The Crown, or its delegate, is required to do more than receive, document, and understand the concerns of Indigenous communities. It is also required to engaged in a "considered, meaningful two-way dialogue".[17] Indigenous communities are entitled to a dialogue that demonstrates that the Crown (i) not only heard, but also gave serious consideration to the specific and real concerns that Indigenous communities put to the Crown, (ii) gave serious consideration to proposed accommodation measures, and (iii) explained how the concerns of the Indigenous communities impacted the Crown's decision to approve (or not approve)

[9] *Clyde River*, para 40.
[10] *Carrier Sekani*, para 44.
[11] *Carrier Sekani*, para 34.
[12] *R v Kapp*, 2008 SCC 41, para 6 [*Kapp*]; *Carrier Sekani*, para 34.
[13] *Kapp*, para 6.
[14] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, para 24.
[15] *Haida*, para 53.
[16] *Haida*, para 41.
[17] *Tsleil-Waututh*, para 558.

the project.[18] Further, the Crown, or its delegate, must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.[19] No such consultation occurred in this proceeding.

16. Anwaatin respectfully submits that the communications undertaken in this case cannot reasonably be determined to be adequate and meaningful consultation. Enbridge's Indigenous consultation reports (at Schedules 22 and 23 of the Application), communications with the Ministry of Energy (as it then was), and responses to Anwaatin's interrogatories in this proceeding all confirm that:

    - Enbridge is relying upon the First Nations' failure to respond to emails and lack of attendance at information sessions as evidence of a lack of concern about the project, rather than a lack of capacity or understanding that Union/Enbridge was undertaking a consultation process;[20]
    - There was no express guidance on the fact that Union/Enbridge was undertaking formal consultation and what the process for that consultation was intended to be or be governed by;
    - First Nations had outstanding questions and concerns and that they reached out to the Ministry of Energy in an effort to better understand;[21]
    - First Nations had a legitimate expectation of further information and consultation on the basis of Union's express promise of same.[22] In fact, a November 21, 2018, email from Union to the Ministry of Energy, Northern Development and Mines confirms that in an October 29, 2018 meeting between Union and Caldwell First Nation "*[w]e ended with confirmation that we would continue the dialogue on this project …*".[23] No further consultation appears to have occurred; and

[18] *Tsleil-Waututh*, para 563.
[19] *Tsleil-Waututh*, para 564.
[20] EB-2018-0188, Exhibit B.Anwaatin.1, pp. 1–2.
[21] EB-2018-0188, Exhibit B.Anwaatin.5, Schedule 1, p. 2.
[22] EB-2018-0188, Exhibit B.Anwaatin.5, p. 1.
[23] EB-2018-0188, Exhibit B.Anwaatin.5, Schedule 1, p. 2.

- All First Nations were expressly told by Union/Enbridge that the project was on hold. Virtually none of the affected First Nations were aware of the fact that the Project was proceeding, and that the Application had been filed in March 2019.

17. We therefore submit that none of the Indigenous communities affected by the Application were meaningfully consulted on, and accommodated in relation to, the Bear Line and Base Line pipeline extensions that are the subject of the Application.

18. Union/Enbridge provided no specific guidance about the form of the consultation process so that Indigenous peoples in the Anwaatin communities knew how consultation would be carried out and could effectively participate and, if necessary, raise concerns with respect to the proposed form of the consultations in a timely manner. Both of these elements are required by law (see paragraphs 14 and 15, above).

19. We also note that the Ministry of Infrastructure's (Infrastructure Ontario's) approval is in part contingent on Enbridge discharging the duty to meaningfully consult Indigenous communities and to keep it apprised of any ongoing consultation and issues raised (at Schedule 21 of the Application, p. 13 of 24). Enbridge does not appear to have complied with this requirement.

20. Anwaatin therefore expressly rejects the Ministry's conclusion that consultation was adequate and requests that the Board deny, delay or defer its further consideration and/or approval of the Application until the Crown's duty to meaningfully consult and accommodate impacted Indigenous rightsholders has been fully discharged in accordance with the inherent and constitutional rights of affected Indigenous communities and the laws of Canada.

II. The proposed Municipal Franchise Agreement must be amended to reflect the Indigenous rights and processes set out in the Official Plan of Chatham-Kent

21. The Municipal Franchise Agreement, which is based on the "Model Franchise Agreement" which the Board uses as a standard when considering applications under the *Municipal*

Franchises Act, does not include reference to Official Plan of Chatham-Kent (the **Official Plan**)[24] with respect to, the following portions thereof:

(a) 2.5.2.1. The Municipality will prepare a Municipal Energy Plan in collaboration with the Local Distribution Companies (LDCs) and other relevant agencies, stakeholders and First Nations in order to: a) Evaluate and accurately measure energy consumption and greenhouse gas emissions across Chatham-Kent; b) Identify solutions and an implementation strategy to improve energy efficiency and conservation; c) Develop local priorities regarding energy infrastructure projects; and d) Integrate energy conservation and sustainability into the planning process for future growth and development.

(b) 5.3.2.8. The Municipality may seek partnerships and coordinate with other levels of government, private agencies and individuals (i.e., local historical societies, genealogical societies, First Nations, etc.) in the conservation of heritage resources in the Municipality, and may participate in government programs available to assist in the implementation of heritage conservation policies.

(c) 5.3.2.27. When the Municipality initiates the development of a Municipal Archaeological Master Plan, the appropriate First Nations shall be provided notification with regard to the identification of burial sites and significant archaeological resources relating to the activities of their ancestors, and they will also be invited to participate in the process.

(d) 6.7.2.9. The Municipality will continue to consult with First Nations communities to: a) Examine opportunities to further promote education on First Nations and environmental history in Chatham-Kent; and b) Explore and consider potential economic partnerships with First Nations.

(e) 7.1.5.9.1.4. The Municipality in consultation with the [Municipal Heritage Committee] and First Nations may undertake the preparation of an Archaeological Management Plan (AMP), which would assist in identifying areas of potential or known archaeological resources.

[24] The Official Plan of the Municipality of Chatham-Kent is available online at: https://www.chatham-kent.ca/business/planning-services/official-plan/.

22. The above elements of the Official Plan were developed in consultation with First Nations. The Municipal Franchise Agreement ought to include reference to the elements of the Official Plan that are relevant to the Application and the 20-year term of the agreement to ensure:

    (a) Any Municipal Energy Plan and First Nations inputs to that plan are reflected, including energy consumption, greenhouse gas emissions (including fugitive methane emissions), energy efficiency and conservation, local priorities regarding energy infrastructure projects, and energy conservation and sustainability into the planning process for future growth and development;

    (b) Coordination with First Nations with respect to the conservation of heritage resources in the Municipality, including archaeological resources that may be present on pipeline rights-of-way, including previously disturbed lands which may continue to contain archaeological resources, and/or which have not been subject to archaeological studies, and/or which may be subject to considerations in an Archaeological Master Plan; and

    (c) That potential economic partnerships with First Nations in relation to the considerations of the Municipal Franchise Agreement and with respect municipal taxes levied on Enbridge.

23. The Municipal Franchise Agreement, once executed, constitutes a Crown decision with the Municipality acting on behalf of the Crown under the *Municipal Act* and the *Planning Act*. Consultation with First Nations with regard to this Crown decision has not occurred.

24. In addition, and subject to the outcome of full and meaningful consultation, Anwaatin therefore requests that the Board require the following additional conditions of any potential approval of the Chatham-Kent (Bear Line and Base Line) pipeline expansions:

    (a) For each work site, during construction and for the lifecycle of the project where maintenance work involving excavation or integrity digs are required, provide First Nations with the following information: (i) exact location and size of site; (ii) plans to protect the environment and sensitive watershed; and (iii) the contamination characteristics, dewatering details, and water treatment and discharge plans for the site;

(b) Require Enbridge to permit monitors selected by the each First Nation to actively participate in Enbridge's environmental and archaeological assessment and monitoring work at any work site, during construction and for the lifecycle of the project where maintenance work involving excavation or integrity digs are required, and any area that has high archaeological potential or has significant environmental concerns, as determined by the First Nations;

(c) Provide reasonable financial resources to the First Nations to hire and administer the monitors and to hire consultants to review the construction permits and approvals required by Enbridge, to the extent necessary to protect the First Nation rights, title and interests, where maintenance work involving excavation or integrity digs are required during construction and for the lifecycle of the project;

(d) Ensure that Enbridge has adequate insurance and/or funds available for any cleanup, compensation and restoration in the event of accidents and malfunctions on the First Nation traditional territory resulting from the project.

(e) Ensure that all affected First Nations communities receive natural gas service and natural rates that reflect their inherent rights to the land and resources upon which the proposed project is built; and

(f) Modify the Municipal Franchise Agreement to reflect elements of the Official Plan, including:

    i. Considerations with respect to any Municipal Energy Plan and First Nations inputs to that plan, including, but not limited to: energy consumption, greenhouse gas emissions (including fugitive methane emissions), energy efficiency and conservation, local priorities regarding energy infrastructure projects, and energy conservation and sustainability into the planning process for future growth and development;

    ii. Coordination with First Nations with respect to the conservation of heritage resources in the Municipality, including archaeological resources that may be present on pipeline rights-of-way, including

previously disturbed lands which may continue to contain archaeological resources, and/or which have not been subject to archaeological studies, and/or which may be subject to considerations in an Archaeological Master Plan; and

iii. Potential economic partnerships with First Nations, which may include (without limitation) municipal taxes levied on Enbridge.

ALL OF WHICH IS RESPECTFULLY

SUBMITTED THIS 24th DAY OF MAY, 2019.

Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin