June 22, 2022

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

Dear Ontario Energy Board Registrar:

Re: Ontario Energy Board File Number EB-2022-0012

We are counsel to the Haudenosaunee Development Institute (the "**HDI**"), intervenor in respect of Application File Number EB-2022-0012 ("**EB-2022-0012**") before the Ontario Energy Board (the "**Board**"). We write regarding the submissions of the Board staff ("**Board Staff**") filed June 15, 2022 ("**Submissions**").

HDI recognizes that Procedural Order Nos. 3 and 4 (dated April 18, 2022, and April 29, 2022, respectively) contemplated Board Staff filing submissions in respect of EB-2022-0012. However, HDI's position is that certain paragraphs of the Submissions should be disregarded.

HDI is of the view that it is inappropriate for Board Staff to make statements, submissions, and/or recommendations to the Board insofar as the honour of the Crown is at stake. The Submissions comment extensively on the Crown's role in respect of its fiduciary and constitutional duties to engage and accommodate. In particular:

1. The Board Staff's conclusory statements on the proper scope of engagement absent any assessment of the Haudenosaunee rights are inappropriate.

2. The Board Staff is not in a position to provide objective commentary on the sufficiency of the Crown's engagement, as in this case the impugned engagement is between the Board and its staff (*i.e.*, the Crown) and the Haudenosaunee.

3. The Board Staff's repeated assertion that "there is no evidence that the Project will have an adverse impact on any Aboriginal or treaty rights" reflects an analytical framework that is incorrect in law.

First, HDI objects to Board Staff making conclusory statements, submissions, and recommendations to the Board regarding the proper scope of engagement in respect of EB-2022-0012. For example, at the second paragraph of page 13 of the Submissions, Board Staff conclude that "OEB staff agrees with Sun-Canadian's position that the level of consultation and

accommodation (if any) required for the Project falls at the low end of the spectrum." To characterize the scope of engagement required presupposes that a preliminary assessment has been done (it has not).

In any event, it is the Crown (*i.e.*, the Board, not Board Staff) that must assess the proper scope of engagement. Board Staff's statements, submissions, and recommendations are concerning given that the Board (nor the Board Staff) has not upheld the Crown's obligation to conduct a preliminary assessment of the strength of the claimed treaty rights of the Haudenosaunee and/or the negative impacts of the proposed development thereon, both of which inform the proper scope and content of such assessment.[1]

Second, HDI further objects to Board Staff's conclusory statements, submissions, and recommendations to the Board regarding the sufficiency of engagement in respect of EB-2022-0012, particularly because the honour of the Crown is at stake and the duty to engage and accommodate lies with the Crown (*i.e.*, the Board and its staff). The Board Staff is not in a position to objectively comment on the sufficiency of the Crown's engagement, as in this case the impugned engagement is between the Board (*i.e.,* the Crown) and the Haudenosaunee.

Finally, HDI objects to Board Staff's repeated assertion that "there is no evidence that the Project will have an adverse impact on any Aboriginal or treaty rights." This reflects an improper analytical framework for engagement and accommodation, which has clouded the remainder of Board Staff's Submissions, particularly regarding the scope of engagement required and whether the Crown's duty was discharged sufficiently. This framework is incorrect in law.

As articulated by the Supreme Court of Canada in *Haida*[2], *Taku*[3], and *Misikew*[4], and as repeatedly affirmed by lower courts, the Crown is required to determine whether the duty to engage has been triggered (*i.e.*, whether there is an asserted or established section 35 right and/or Aboriginal title) and assign the appropriate scope and content to the duty.

In light of the above, HDI respectfully submits that the Board disregard Board Staff's Submissions at pages 12 to 13 contained under subheadings "The duty to consult in the current proceeding" and "OEB staff conclusion with respect to Indigenous consultation and the duty to consult" in rendering its ultimate decision.

Yours truly,

GILBERT'S LLP

Tim Gilbert

[1] See e.g., *Canada (Attorney General) v Long Plain First Nation*, 2015 FCA 177 at para 102, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[3] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74.
[4] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.