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October 6, 2022

Delivered By Email & RESS

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

Dear Ms. Marconi,

Re: Ontario Energy Board File No. EB-2022-0140
Submissions of the Haudenosaunee Development Institute

Pursuant to the Ontario Energy Board's Procedural Order No. 4 dated September 27, 2022, please find enclosed HDI's submissions in the above-captioned matter.

If you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

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EB-2022-0140

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; and in particular sections 92 and 97 thereof

AND IN THE MATTER OF an application by Hydro One Networks Inc. for leave to construct an electricity transmission line between Chatham Switching Station and Lakeshore Transmission Station

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SUBMISSIONS OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE

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TABLE OF CONTENTS

OVERVIEW **3**

BACKGROUND **4**

A. The Haudenosaunee Confederacy, Haudenosaunee Confederacy Chiefs Council, and Haudenosaunee Development Institute 4

B. The Haudenosaunee Interest in the Project 4

C. The Existing OEB Process 5

SUBMISSIONS **6**

A. The Existing OEB Process is Improper—It Must Consider Issues of Indigenous Engagement 7

1. Certain Conditions Require Consideration of Indigenous Issues 8

2. The Existing OEB Process is Predicated on an Erroneous Interpretation of the OEB Act 9

3. UNDRIP requires the OEB to Consider Sufficiency of Engagement ... 16

B. Even the Existing OEB Process Requires Evidence and Preliminary Assessments 18

C. The Board Cannot Grant Approval Absent the Free, Prior, and Informed Consent of the Haudenosaunee 21

D. At Minimum, the Board Must be Satisfied with the Adequacy of Engagement24

4. Satisfaction of Engagement is a Necessary Condition of Approval...... 25

OVERVIEW

1. The Ontario Energy Board cannot grant Hydro One's request for leave to commence construction on its proposed project. ***First***, it is proceeding on the basis of an improper process that refuses to consider issues relating to Indigenous engagement. ***Second***, the Board has refused to accept or consider evidence relating to Indigenous rights and impacts of the Project thereon. ***Third***, the Crown and the proponent have failed to obtain the consent of the Haudenosaunee as required by the United Nations Declaration on the Rights of Indigenous Peoples, or in the absence of such consent, justify infringements of Haudenosaunee rights.

2. The Board's current process (and list of issues it says it may consider) is based on an erroneous and overly restrictive interpretation of the *Ontario Energy Board Act* that, particularly in light of the *UNDRIP Act*, must be reconsidered. Expanding the Board's current interpretation to include the consideration of Indigenous engagement will bring their processes in line with this landmark legislation.

3. Based on its own narrow interpretation of *Ontario Energy Board Act*, the Board has also refused to accept evidence of Indigenous rights and impacts thereon and plowed ahead absent assessments thereof. Even if the Board's process is valid (which is denied), the dearth of evidence in this matter precludes an approval of the application.

4. Further, the *UNDRIP Act* requires that the Crown obtain Haudenosaunee consent prior to proceeding with the project. Canadian law confirms that in the circumstances, the Crown must either obtain consent or justify infringements on Haudenosaunee rights. To date, that consent has neither been sought nor provided and the Crown has not attempted to justify infringements.

5. Given the improper process, the absence of necessary evidence, and the failure to obtain consent or justify infringements, the Board cannot grant this application. It must reconsider the interpretation of the *OEB Act* and provide a framework that upholds the Honour of the Crown.

BACKGROUND

A. The Haudenosaunee Confederacy, Haudenosaunee Confederacy Chiefs Council, and Haudenosaunee Development Institute

6. The Haudenosaunee Confederacy is a confederacy of Nations formed in time immemorial, long before European contact in North America. The Haudenosaunee Confederacy is comprised of, among others, the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Peoples. References to the "Haudenosaunee" refer to citizens of the Haudenosaunee Confederacy.

7. The Haudenosaunee Confederacy Chiefs Council (the "**HCCC**") is the council of chiefs of the Haudenosaunee Confederacy that have been continuously holding Council at Ohsweken for over 230 years. The HCCC is empowered by the Haudenosaunee to advance the collective treaty rights and interests of the Haudenosaunee.

8. The Haudenosaunee Development Institute ("**HDI**") was established in 2007 and acts pursuant to delegated authority from the HCCC to administer and facilitate engagement with the HCCC in respect of Haudenosaunee lands.

B. The Haudenosaunee Interest in the Project

9. Hydro One Networks Inc. ("**Hydro One**") seeks to construct approximately 49 kilometres of 230 kilovolt double-circuit transmission line between Chatham Switching Station and Lakeshore Transformer Station and associated station facilities (the "**Project**"). On May 9, 2022, Hydro One filed an application with the Ontario Energy Board (the "**OEB**" or "**Board**"), seeking

leave to commence construction on the Project (the "**Leave to Construct Application**" or "**Application**").

10. The location of the Project falls within the territory described in the Nanfan Treaty of 1701 (the "**Nanfan Treaty**"). The Haudenosaunee are a party to, and a beneficiary of, the Nanfan Treaty.

11. The Nanfan Treaty explicitly recognizes and affirms the Haudenosaunee right to undisturbed hunting and harvesting over the territory, consistent with the historical use of the land by the Haudenosaunee. The scope of the land under the Nanfan Treaty required the establishment of numerous autonomous encampments and settlements, which were supported by hunting, fishing, horticulture, and other activities.

12. The Nanfan Treaty also confers certain procedural rights, including the ability to provide—or withhold—free, prior, and informed consent and to be meaningfully engaged in respect of a project.

C. THE EXISTING OEB PROCESS

13. The Board has made clear throughout the Leave to Construct Application that issues related to the government's duty to consult Indigenous people is not part of its review (the "**Existing OEB Process**"),[1] and that the duty to consult for the Project is led by the Ontario government as part of the environmental assessment process (the "**Environmental Assessment Process**").[2]

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[1] Notice of Application, EB-2022-0140, dated June 3, 2022.

[2] Procedural Order No. 1 in EB-2022-0140, dated July 13, 2022, page 4.

14. The OEB's purported basis for the limited scope of the Existing OEB Process is the OEB's own jurisprudence in which the Board has narrowly interpreted the scope of its mandate under section 92 of the *Ontario Energy Board Act* (the "***OEB Act***").[3] The Board has interpreted the *OEB Act* as limiting its authority to consider the constitutional duty to consult to instances where it is clearly relevant to the issues of price, reliability and quality of electricity service such as impacts relating to the cost of schedule for a project.[4]

SUBMISSIONS

15. The Board cannot grant Hydro One leave to construct under the Existing OEB Process—it must consider issues of Indigenous engagement. Forging ahead under the Existing OEB Process, which is predicated on an erroneous interpretation of the *OEB Act*, perpetuates a legal error that has not had opportunity for correction in the Courts.

16. This Application presents an opportunity for the Board to reconsider its improper interpretation of the *OEB Act* (in particular, in light of the principles enshrined in the *UNDRIP Act*), and to employ a review process consistent with advancing the goal of reconciliation.

17. If the Board refuses to take this opportunity, its own erroneous narrowing of its jurisdiction still, at a minimum, requires the Board to consider evidence and preliminary assessments of Haudenosaunee rights and the impact the Project will have on those rights. The Board should not approve the Project in the absence of any preliminary assessment and critical evidence related thereto.

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[3] OEB Letter dated August 5, 2022, page 2, citing EB-2009-0120 (Decision on Questions of Jurisdiction and Procedural Order No. 4, November 18, 2009) and EB-2017-0182 (Decision and Order, December 20, 2018).

[4] OEB Letter dated August 5, 2022, page 3.

18. Even if the Board were to reconsider the Existing OEB Process and/or consider a preliminary assessment and evidence related thereto, the Board should still not approve the Project because the Haudenosaunee have not provided their consent in respect of the Project. The Board is bound the articles of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**")[5] and the goal of advancing reconciliation. Therefore, the Board cannot approve the Application absent the provision of the Haudenosaunee's free, prior, and informed consent. If the Board disagrees, it should commit to this position in written reasons on this Application.

19. Finally, at minimum, under no circumstances can the Board approve Hydro One's Application unless and until it is satisfied that the Crown's constitutional duty to engage with the Haudenosaunee has been satisfied. If necessary, this assurance may be provided as a condition in the Board's order.

A. THE EXISTING OEB PROCESS IS IMPROPER—IT MUST CONSIDER ISSUES OF INDIGENOUS ENGAGEMENT

20. Despite its position to the contrary, the Board must consider issues of Indigenous engagement in the Application. If it does not, the Board will:

(i) fail to appreciate the context and rationale for exercising powers within its statutory mandate;

(ii) continue to support an erroneous interpretation of the *OEB Act* that creates absurd consequences and ignores rules of statutory interpretation; and

(iii) pursue a process that does not align with the requirements under the *UNDRIP Act*.

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[5] United Nations Declaration on the Rights of Indigenous Peoples, 2007 [***UNDRIP***].

21. A process that does not consider issues relating to Indigenous engagement is inadequate as it relates to addressing the Crown's constitutional obligations. There must be more than an available process; the process must be *meaningful*.[6] An offer to participate in a fundamentally inadequate process, like the Existing OEB Process, does not uphold the Honour of the Crown.[7]

1. Certain Conditions Require Consideration of Indigenous Issues

22. The Board's ability to include conditions addressing the accommodation of Indigenous peoples in an order demands the consideration of engagement.

23. Where the Crown's duty to engage necessitates accommodation for the affected Indigenous group, the legality and binding nature of the accommodation finds its source in the Board's conditions of approval.[8] In other words, conditions can only be imposed through the granting of the leave to construct application.

24. In *Gitxaala Nation*, the Federal Court of Appeal found that the decision-maker's ability to consider issues of consultation was necessary for it to exercise its powers under its enabling statute.[9] The Court supported this finding in part based on subsection 31(2) of the *Interpretation*

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[6] *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para 77 [***Chartrand***].

[7] *Chartrand* at para 69.

[8] The concept of conditions representing accommodation as part of the Crown's duty to engage is found in *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196 at paras 143-149 [***Attawapiskat***] (albeit in the context of a decision pursuant to the *Mining Act*, RSO 1990, c M 14). Further, the Board's Standard Conditions of Approval for Electricity Leave to Construct Applications require that the applicant obtain all necessary approvals, permits, licenses, certificates, agreements, and rights required to construct, operate, and maintain the project (see e.g. Procedural Order No. 1 in EB-2022-0140, dated July 13, 2022, Attachment 1: Standard Conditions of Approval for Electricity Leave to Construct Applications). Depending on their nature, conditions addressing accommodation are a necessary permit, license, agreement, and/or right.

[9] *Gitxaala Nation v Canada*, 2016 FCA 187 at para 166 [***Gitxaala Nation***]. The powers at issue were those under sections 53 and 54 of the *National Energy Board Act*, RSC, 1985, c N-7. S. 53(1) reads: After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration. S. 54(1) reads: After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order, (a) direct the Board to issue

Act, which provides that where a statute gives to a public official the power to do a thing, all powers necessary to allow that person to do the thing are also given.[10]

25. The *OEB Act* and the powers it bestows upon the Board are no different. The source of the Board's power to impose conditions in making an order is section 23 of the *OEB Act*. Where conditions are a product of accommodation, the Board must have the ability to consider whether the consultation and engagement upon which the accommodation is derived was sufficient.

26. Like in *Gitxaala Nation*, Ontario's *Interpretation Act* is instructive: where the power to include conditions in an order is given to the Board, all such powers necessary to enable the Board to include conditions shall be understood to also be given.[11] This must include the power to consider issues of engagement.

2. *The Existing OEB Process is Predicated on an Erroneous Interpretation of the OEB Act*

27. The Existing OEB Process is based on the Board's incorrect interpretation of the *OEB Act*, section 96, which does not consider the surrounding legislative context, ignores the rules of statutory interpretation, and creates absurd consequences in respect of the Crown's constitutional duties of engagement.

28. Further, the Existing OEB Process ignores significant legislative changes in Canada, including the coming into force of the *UNDRIP Act*.

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a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or (b) direct the Board to dismiss the application for a certificate. Also note para 120 of *Gitxaala*, in which the Court finds that the only meaningful decision-maker is the Governor in Council.

[10] *Gitxaala Nation* at para 165; *Interpretation Act*, RSC 1985, I-21.

[11] Subsection 28(b) of the *Interpretation Act*, RSO 1990, c I.11 reads: where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

29. Section 96 provides that:

> **96** (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.
>
> (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:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

30. Historically, the Board has interpreted section 96 of the *OEB Act* extremely narrowly in terms of what the Board is permitted to consider in a section 92 application, and has found that it is only capable of a single meaning.[12] Specifically, the Board has held that, "[i]n enacting section 96(2) of the [*OEB Act*], the Legislature has clearly demonstrated its intention to exclude from the Board's purview any matters other than those directly associated with the interests of consumers with respect to price and the reliability and quality of electricity service".[13]

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[12] Decision and Order, EB-2017-0182, EB2017-0194, EB-2017-0364, dated December 20, 2018, page 12.

[13] EB-2012-0082, Hydro One Lambton-Longwood Leave to Construct Decision and Order, November 8, 2012, p. 12.

31. **The Board has chosen to ignore alternative interpretations of section 96**, including the most reasonable and logical interpretation, which acknowledges the sequential nature and lack of limitation on step one.

32. Specifically, the Board errs in its interpretation of the following operative phrase in s. 96: "[i]f, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest".

33. Parliament clearly differentiates between "an application under section 90, 91 or 92" and the "proposed work". The two are not synonymous. Support for this differentiation is found in section 94 of the *OEB Act*, which requires that an applicant "file with the application a map showing the general location of the proposed work . . .".

34. Importantly, section 96 is composed of two steps. First, the Board considers the application under section 90, 91, or 92. Second, the Board considers construction, expansion, or reinforcement of the proposed work.

35. The Board's *initial consideration of an application* in step one is not limited to any particular issue(s). It is only *after* considering the application, when considering whether the *proposed work is in the public interest* in step two, that the Board is limited to considering the "interests of consumers with respect to prices and the reliability and quality of electricity service." The Board's statutory interpretation ignores the sequential nature of section 96.

36. **Parliament did not clearly exclude consideration of engagement.** If Parliament intended to remove engagement from the Board's consideration of an application, it could have explicitly done so. For example, section 96(1) could have read: "If the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall

make an order granting leave to carry out the work." But they did not. Rather, Parliament mandated the consideration of whether the proposed work was in the public interest only *after* considering the application.

37. This kind of clear exclusion can be seen in the *Responsible Energy Development Act* (an Alberta statute comparable to the *OEB Act*). In contrast to the *OEB Act*, the *Responsible Energy Development Act* contains a clear example of the legislature's intention to remove a regulator's authority to consider the adequacy of Crown consultation. Section 21 provides that the "Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*."[14] The *OEB Act* contains no such statement.

38. **The Board is empowered to consider engagement issues.** Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn.[15] The Board is empowered under section 19 of the *OEB Act* to consider questions of law,[16] and therefore, it must consider whether consultation in respect of its decision-making authority was constitutionally sufficient. Further, as discussed above, the issue of consultation has not clearly been excluded from the *OEB Act* as it has in similar provincial acts.

39. Given the widely accepted principle that where a Crown entity considers a project that may impact Section 35 rights, the decision-maker must ensure that the duty to consult has been

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[14] *Responsible Energy Development Act* SA 2012, c R-17.3.

[15] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 35-36 [***Clyde River***].

[16] Section 19(1): The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

fulfilled,[17] it follows that the Board's consideration of an application, prior to considering whether a project is in the public interest, would include a consideration of issues relating to engagement.

40. In light of the above, the Board is left with two possible interpretations of section 96 of the *OEB Act*: one that considers and addresses sufficiency of engagement, and in so doing, upholds (or at least has the ability to uphold) the Honour of the Crown; and one that does not. To date, the Board has chosen to adhere to the latter interpretation.

41. **Any ambiguity must be resolved in favour of Indigenous peoples.** In deciding which interpretation to adopt, as a starting point, it is a well-recognized principle of statutory interpretation that statutory provisions capable of multiple meanings should be interpreted in a manner that preserves their constitutionality.[18] Similarly, interpretations that lead to absurd or inequitable results should be avoided.[19]

42. The Supreme Court of Canada has held that statutes relating to Indigenous peoples should be liberally construed and doubtful expressions resolved in favour of Indigenous peoples.[20] The Board should heed the Supreme Court's guidance and choose to adopt an interpretation of section 96 that allows for meaningful consideration of Indigenous engagement.

43. **The *OEB Act* must be interpreted as a complete code.** Express language that ousts the duty to engage may be inconsistent with the recognition and affirmation of rights under subsection 35(1) of the *Constitution Act, 1982* and thus invalid.[21]

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[17] *Clyde River* at para 39; *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89 at para 47; *Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292 at para 27.

[18] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 32.

[19] *R v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 65.

[20] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 98.

[21] *Gitxaala Nation* at para 160.

44. In *Gitxaala Nation*, the Federal Court of Appeal interpreted the legislation at issue (the *National Energy Board Act*) in such a way as to respect Canada's duty to consult, thereby retaining its validity.[22] With this interpretation, the *National Energy Board* represented a complete code.[23]

45. Similarly, language interpreted to oust a procedural aspect of the Crown's duty to engage, that is, the consideration of engagement, is inconsistent with and/or impairs constitutionally protected procedural rights. Such an interpretation of the *OEB Act* renders it an incomplete code for decision-making regarding leave to construct applications.

46. Despite the Board's assurance that the Environmental Assessment Process adequately addresses engagement, this is not relevant unless the statutory regime under which the Environmental Assessment Process is administered, the *Environmental Assessment Act*,[24] is specifically incorporated into the *OEB Act*.[25] An *OEB Act* that removes the Board's consideration of engagement and is silent on legislation that empowers a process that allegedly considers engagement, is not whole.

47. **The Board's current interpretation creates absurd consequences.** The Supreme Court of Canada has warned:

> The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.[26]

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[22] *Gitxaala Nation* at para 163.

[23] *Gitxaala Nation* at para 119.

[24] *Environmental Assessment Act*, RSO 1990, c E 18.

[25] *Gitxaala Nation* at para 119.

[26] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 62.

48. The Existing OEB Process is a real-life embodiment of the situation the Supreme Court cautions against. The power to rule on engagement is split between two governmental decision makers—the OEB (under the direction of the Minister of Energy), in respect of engagement that relates to projects and prices, and the Ministry of Environment, Conservation and Parks, and its Environmental Assessment Process, in respect of all remaining engagement issues. HDI's position is that, to date, neither process has effectively dealt with engagement in respect of the Project, and that the government has therefore been able to effectively avoid its duty.

49. The Board's interpretation of the *OEB Act* to date (underpinning the Existing OEB Process) does not resolve ambiguities in the process in favour of Indigenous peoples, and results in the following absurdities:

(i) despite the Board's inability to consider whether the consultation and engagement that precipitated the accommodation was sufficient, the Board can issue binding orders that include conditions addressing accommodation of affected Indigenous people (discussed at paragraphs 22-26);

(ii) the Board's consideration of engagement as it relates to prices is made without any evidence or consideration of Indigenous rights or impacts thereon (discussed at paragraphs 60-71); and

(iii) the Board is incapable of addressing any issues and/or requirements relating to UNDRIP (discussed at paragraphs 74).

50. Section 96 of the *OEB Act* can and should be interpreted in such a way as to respect and meaningfully fulfill the Crown's duty to engage.[27] The Board should therefore adopt the interpretation that permits it to consider issues of engagement with Indigenous peoples.

3. UNDRIP requires the OEB to Consider Sufficiency of Engagement

51. The Board's position that it is not required to consider issues of Indigenous engagement under the Existing OEB Process is inconsistent with the principles enshrined in UNDRIP.

52. The *UNDRIP Act*[28] came into force June 21, 2021, affirming UNDRIP's application in Canadian law and requiring that the Crown, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP.[29]

53. The Board, exercising executive power authorized by the *OEB Act*, is the vehicle through which the Crown acts—a decision of the Board therefore constitutes Crown action.[30] As such, the Board is bound by UNDRIP and must take all measures necessary to ensure that the laws of Canada are consistent with the articles enumerated in UNDRIP.

54. Although the *UNDRIP Act* is federal legislation, HDI's position is that it applies to the *OEB Act* and Crown entities – including the Board – acting thereunder. Indeed, the Ontario Courts have held that UNDRIP is a source of interpretation of Canadian law,[31] and similar legislation has

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[27] *Gitxaala Nation* para 163.

[28] SC 2021, c 14 ["***UNDRIP Act***"].

[29] *UNDRIP Act*, ss 4(a) and 5.

[30] *Clyde River* at para 29.

[31] *Attawapiskat* at para 96.

been put forward in the Province of Ontario by way of a private member's bill, *Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act, 2019*.[32]

55. The processes by which States engage with Indigenous peoples in respect of executive decision-making is addressed in Articles 19 and 27 of UNDRIP:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> […]
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

56. With the coming into force of the *UNDRIP Act*, the Crown must take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP.[33]

57. As an administrative measure, the OEB has never requested nor received the free, prior, and informed consent of the Haudenosaunee before adopting and implementing the Existing OEB Process. Nor has the OEB established and implemented the Process in conjunction with the Haudenosaunee.

58. The Supreme Court of Canada in *Mikisew Cree First Nation* suggested that the adoption of subordinate legislation, such as regulations or rules, triggers the duty to consult.[34] The Existing

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[32] Bill 76, *United Nations Declaration on the Rights of Indigenous Peoples Act*, 1st Sess, 42nd Par, Ontario, 2019, online: <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-76>

[33] *UNDRIP Act*, s 5.

[34] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para 51.

OEB Process, adopted in the absence of consultation, and currently standing in the face of Haudenosaunee objection, can be altered to adhere to the Articles of UNDRIP and take one meaningful step to advancing the goals of reconciliation.

59. Maintaining a process that refuses to consider Indigenous issues, and that is based on an interpretation of the *OEB Act* made before UNDRIP was affirmed in Canadian law, will only serve to endorse a version of paternalism entirely inconsistent with the Crown's duties and the Honour of the Crown.

B. EVEN THE EXISTING OEB PROCESS REQUIRES EVIDENCE AND PRELIMINARY ASSESSMENTS

60. The Board has repeatedly made clear that its position is the Existing OEB Process does not require consideration of issues related to the Crown's duty to engage with Indigenous peoples.[35] However, it has recognized that the reasonableness of Hydro One's estimates of the cost of the Project is a live issue in the proceeding as it goes to the issue of price. The Board has also accepted that costs relating to engagement may have an impact on the total Project costs.[36]

61. Costs related to Indigenous engagement are therefore within the scope of the Board's review. In the Board's words: "The OEB's authority to consider . . . the Constitutional duty to consult is therefore limited to the issues set out in section 96(2) of the OEB Act; in other words, where these matters are relevant to the issues of price . . .".[37]

62. **The Board requires evidence to assess engagement as it relates to prices.** The Board's narrow scope of consideration of engagement issues is unworkable in light of its absolute refusal

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[35] See e.g. Notice of Application, dated June 3, 2022.

[36] Procedural Order No. 2 in EB-2022-0140, dated August 23, 2022, page 2.

[37] OEB Letter dated August 5, 2022, page 3.

to accept and/or consider any evidence relating to, among other things, the identity of the Haudenosaunee and nature of Haudenosaunee treaty rights.[38] The Board cannot meaningfully consider any aspect of engagement, including its impact on price, without any evidence, especially the foundation upon which engagement is constructed, that is, the Haudenosaunee and their treaty rights.

63. **The Board requires preliminary assessments to consider the reasonableness of engagements costs.** A meaningful consideration of the reasonableness of Hydro One's costs of engagement also requires an assessment of the impact on Haudenosaunee rights, commonly known as a "preliminary assessment".

64. The scope and degree of engagement required by the Crown falls on a spectrum. It is proportionate to a preliminary assessment of the established right, and the seriousness of the potentially adverse effect upon the claimed right.[39] It follows that a preliminary assessment, which determines the scope of the Crown's duty to engage, will provide the benchmark against which the reasonableness of actual and estimated engagement costs will be assessed.

65. Without a preliminary assessment (and therefore, no knowledge of the necessary scope and degree of the Crown's duty), the Board cannot assess the reasonableness of Hydro One's engagement costs.

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[38] Procedural Order No. 2 in EB-2022-0140, dated August 23, 2022, page 3.

[39] *Attawapiskat* at para 75; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 at para 39 [***Haida***]; *Canada v Long Plain First Nation* 2015 FCA 177 at para 102, citing *Haida* at para 39.

66. To illustrate, Hydro One informed HDI that estimated costs directly related to Indigenous consultation initiatives are approximately $7 million.[40]

67. If the scope of the duty to engage is at the lower end of the spectrum (which HDI denies), $7 million may be a vast overspend. If, on the other hand, engagement falls on the higher end, $7 million may be woefully inadequate to satisfy the Crown's duty to engage, including accommodation and/or justification for the infringement of established Haudenosaunee treaty rights.

68. Going a step further, consider the situation where accommodation requires a substantial financial agreement between a proponent and Indigenous group that significantly impacts price. How could the Board possibly assess the reasonableness of this cost absent evidence of rights or preliminary assessments?

69. The Board's refusal to accept evidence, and the Crown's (whether the Board or otherwise) failure to conduct and provide the results of a preliminary assessment renders the scoping of the Crown's duty to engage impossible, and precludes a consideration of the reasonableness of Hydro One's costs with respect to engagement.

70. Hydro One's submissions do not address the reasonableness of its costs of engagement. The Board cannot simply take notice that Hydro One's engagement costs are reasonable. If it does,

[40] Hydro One Supplementary Interrogatories, Exhibit I, Tab 3, Schedule 5, page 3 (PDF page 18). This estimate takes into account both project specific factors (e.g., number and extent of communities affected, nature of impacts, etc.) and more general factors (e.g., prior project experiences, planned engagements and external resourcing requirements).

it is merely paying lip service to this issue, rather than undertaking a sincere attempt at meaningful consideration that is respectful of the Haudenosaunee's treaty-based relationship with the Crown.[41]

71. Accordingly, the Board cannot approve Hydro One's Application.

C. THE BOARD CANNOT GRANT APPROVAL ABSENT THE FREE, PRIOR, AND INFORMED CONSENT OF THE HAUDENOSAUNEE

72. In accordance with the *UNDRIP Act*, the Board cannot grant Hydro One's Leave to Construct Application absent the free, prior, and informed consent of the Haudenosaunee.

73. Article 32(2) of UNDRIP affirms that the Crown must consult and cooperate in good faith with the Haudenosaunee through their own representative institutions to obtain their free, prior, and informed consent prior to the approval of any project affecting Haudenosaunee treaty lands.[42]

74. The ability of the Board to meaningfully consider the issue of Haudenosaunee consent under UNDRIP is limited (and/or not possible) given the Board's refusal to accept evidence regarding Haudenosaunee lands and rights—if you cannot understand the lands, you cannot understand the effects of a project thereon. The necessity of consent is therefore indeterminable.

75. In any event, and as discussed above, decisions of the Board constitute Crown actions.[43] The Project, therefore, cannot proceed unless and until the Crown obtains the free, prior, and informed consent of the Haudenosaunee.

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[41] *Saugeen First Nation v Ontario (MNRF)* 2017 ONSC 3456 at paras 6, 51-59, and 61.

[42] *UNDRIP Act,* Schedule, Art. 32(2).

[43] *Clyde River* at para 29.

76. The draft Environmental Study Report recognizes that the Project, which is moving ahead with Route 2A, will have the following effects on Haudenosaunee rights and their treaty lands:[44]

(i) "Alternative 2A is closer (than other alternatives) in proximity to identified area of historic significance, but not as close as Alternative 2B.";[45]

(ii) "Affects 6.18 ha of lands identified that have potential to support hunting, trapping, and harvesting activities."[46]

(iii) "Traverses 1.57 km of watercourse, crossing 26 watercourses in total with potential to effect fish habitat."[47]

(iv) "Affects 1.90 ha of [rare/undisturbed] native habitat[s/ecosystems]. The measured level of disturbance to native habitats (within Alternative 2 routes) is calculated at 3.21 average coefficient of conservatism (highly disturbed)."[48]

(v) "Affects 4.79 ha of potential [Species at Risk] habitat (Eastern Foxsnake, Lake Chubsucker, Lilliput and SAR bats), including subsequent species regeneration potential."[49]

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[44] The Chatham to Lakeshore 230 kV Transmission Line Class Environmental Assessment, Draft Environmental Study Report, dated June 11, 2021, Table 5-6: Comparative Evaluation Results (PDF pages 217-218) [***Study Report***].

[45] *Study Report*, Table 5-6: Metric of Measurement/Scoring: Relative proximity to Anishnawbek and Haudenosaunee identified areas of historical significance associated with the Thames River.

[46] *Study Report*, Table 5-6: Metric of Measurement/Scoring: Effects on lands with habitat or vegetation types that support or have potential to support hunting/trapping/harvesting activities and medicinal plants.

[47] *Study Report*, Table 5-6: Metric of Measurement/Scoring: Effects to identified aquatic habitat and/or known watercourses with fishery management programs.

[48] *Study Report*, Table 5-6: Metric of Measurement/Scoring: Effects to rare habitats in Southwestern Ontario including tall grass prairies, savannah, native woodlands, natural wetlands, etc. and measured level of disturbance of native habitat and ecosystems based on calculated average coefficient of conservatism.

[49] *Study Report*, Table 5-6: Metric of Measurement/Scoring: Long-term effects to SAR and their regeneration potential.

77. Given the extensive impact of the Project on Haudenosaunee lands and rights recognized in Hydro One's own draft Environmental Study Report, the Crown must consult and cooperate with the Haudenosaunee to obtain the Haudenosaunee's consent prior to approval.

78. Indeed, even Hydro One in its *Indigenous Relations Policy*, states that its goal is to "achieve the agreement and support, articulated in UNDRIP as "Free Prior and Informed Consent", of Indigenous peoples."[50]

79. Hydro One has not sought, nor have the Haudenosaunee provided, their consent to the Project. If the Board approves the Leave to Construct Application, it will be doing so contrary to the provisions of UNDRIP.

80. The concept of obtaining the consent of Indigenous peoples did not originate with the *UNDRIP Act*. In 2014, the Supreme Court of Canada held that once Aboriginal title is established, subsection 35(1) of the *Constitution Act, 1982*[51] permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty.[52] The Courts have also held that treaty rights, like the Haudenosaunee rights at issue in respect of the Project, are akin to Aboriginal rights stemming from Aboriginal title.[53]

81. The onus is on the Crown to justify infringement of Haudenosaunee rights on the basis of a compelling and substantial purpose and to establish that incursions are consistent with the

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[50] Hydro One, "Hydro One Indigenous Relations Policy" (November 2021), online pdf: Hydro One <https://www.hydroone.com/abouthydroone/indigenousrelations/Documents/Hydro%20One%20Indigenous%20Relations%20Policy.pdf>.

[51] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 s 35.

[52] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 2 [***Tsilhqot'in***].

[53] *Tsilhqot'in* at para 132; *R v Badger*, [1996] 1 SCR 771 at para 82.

Crown's fiduciary duty.[54] The Crown has never provided the Haudenosaunee with such a justification. As a result, and absent the Haudenosaunee's free, prior, and informed consent, the Board cannot approve Hydro One's Leave to Construct Application.

82. HDI has raised the issue of consent under UNDRIP in past submissions before the Board.[55] Regrettably, the Board has not meaningfully addressed these submissions. HDI respectfully requests that the Board address these submissions in respect of this Application, including providing written reasons as to the Board's interpretation of UNDRIP and its applicability to cases before the OEB.

83. As set out in *Clyde River*, "[w]ritten reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed […] Reasons are 'a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation' […] Written reasons also promote better decision making."[56]

D. AT MINIMUM, THE BOARD MUST BE SATISFIED WITH THE ADEQUACY OF ENGAGEMENT

84. In the alternative, if the Board's interpretation of the *OEB Act* is correct (which is denied), and the Board chooses to move ahead with the Existing OEB Process (which HDI submits is improper), the Board must nevertheless satisfy itself that the Crown adequately fulfilled its engagement duties owed to the Haudenosaunee in respect of the Project prior to granting the Application.

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[54] *Tsilhqot'in* at paras 18 and 77; *R v Sparrow*, [1990] 1 SCR 1075 at 1108 and 1109.

[55] See for example HDI's Submissions in EB-2022-0012, dated June 15, 2022, at paras 24-31.

[56] *Clyde River* at para 41.

85. The Board is the final decision-maker in respect of the Project; therefore, it is incumbent on the Board to assess whether the Crown's duty to engage with the Haudenosaunee has been fulfilled prior to approval. The Supreme Court of Canada has held that where approval is granted absent this fulfillment, the approval decision must be quashed on judicial review.[57]

86. To proceed in the absence of this confirmation is for the Board to greenlight a construction project affecting Haudenosaunee treaty lands with the *hope* that the Haudenosaunee have been engaged in a manner that upholds the Honour of the Crown. At best, this course of action constitutes willful blindness; at worst, it represents an approach that will serve to injure and corrode, rather than advance, the goals of reconciliation.

87. The Board cannot possibly take the position that if the Crown's duty is not satisfied, it can still grant Hydro One's Application.

4. Satisfaction of Engagement is a Necessary Condition of Approval

88. To date, the Environmental Assessment Process has not been concluded. A final Environmental Study Report remains outstanding.[58] There is no opinion or recommendation in the record before the Board that suggests the Crown's duty to engage with the Haudenosaunee in respect of the Project has been satisfied.

89. This alone precludes the Board's approval of the Application.

90. However, if the Board proceeds to grant approval, it must do so on the express condition that the Crown's duty to engage with the Haudenosaunee, through HDI or the HCCC, has been discharged prior to construction.

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[57] *Clyde River* at para 39.

[58] Hydro One Supplementary Interrogatories, Exhibit I, Tab 3, Schedule 5, page 3 (PDF page 18).

91. The Board itself has acknowledged the necessity of this condition, stating that "it is expected that any order granting Hydro One leave to construct the Project will be conditional on the Environmental Assessment".[59]

92. Conditions of this nature are not without precedent. In EB-2017-0182, the Board required that the successful applicant obtain all necessary approvals, including "EA approval". The Ministry of the Environment, Conservation and Parks confirmed that environmental approval would not be granted if issues related to Indigenous consultation remained outstanding.[60]

93. Hydro One also supports such a condition, in that it does not expect the Board's authorization for leave to construct would permit project construction to proceed before it has submitted a final Environmental Study Report with Ministry.[61]

94. If the Board decides to approve Hydro One's Application, the Board must therefore include this condition.

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[59] Procedural Order No. 2 in EB-2022-0140, dated August 23, 2022,, page 3. Also see OEB Letter dated August 5, 2022: "It is a standard condition of approval in any approval granted under section 92 of the OEB Act that the applicant obtain all necessary approvals, permits, licences, certificates, agreements and rights required to construct, operate and maintain the project.".

[60] EB-2017-0182, EB-2017-0194, EB-2017-0364, Decision and Order, dated December 20, 2018, page 63.

[61] Hydro One Supplementary Interrogatories, Exhibit I, Tab 3, Schedule 7, page 2 of 2 (PDF page 30).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of October, 2022.

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