

August 9, 2023

Ms. Nancy Marconi
Registrar
Ontario Energy Board
P.O. Box 2319,
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**RE: EB-2022-0248 – Mohawks of the Bay of Quinte Community Expansion
Project Leave to Construct**

**Written Submissions of the Mohawks of the Bay of Quinte First Nation
Our File No.: 57658**

We are counsel to the Mohawks of the Bay of Quinte First Nation ("MBQ") in the above-noted proceedings. Please find enclosed the written submissions of the MBQ, pursuant to Procedural Order No.5.

We respectfully request that the Board and other parties ensure that all future documents and submissions are served electronically on myself, at hvanwinssen@tmlegal.ca and on the Chief the MBQ, Chief R. Donald Maracle at rdonm@mbq-tmt.org.

Should you have any further questions, please contact the writer.

Yours very truly,

TEMPLEMAN LLP


HAROLD VAN WINSEN
HVW/nc
Encl.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; and in particular sections 90(1) and 97 thereof;

AND IN THE MATTER OF an application by Enbridge Gas Inc. for an order granting leave to construct natural gas distribution pipelines and ancillary facilities that make up a Community Expansion Project to serve the community of Mohawks of the Bay of Quinte First Nation and part of Tyendinaga Township;

AND IN THE MATTER OF applications by Enbridge Gas Inc. for an Order or Orders approving the proposed forms of agreements for Pipeline Easement and Options for Temporary Land Use associated with the aforementioned application seeking leave to construct.

**MOHAWKS OF THE BAY OF QUINTE FIRST NATION
WRITTEN SUBMISSION**

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INTRODUCTION

1. The Mohawks of the Bay of Quinte are a recognized Mohawk First Nation pursuant to the *Indian Act*, RSC, c.1-5, 1985 and have full intervenor status in these proceedings.
2. The Mohawks of the Bay of Quinte (“MBQ”) are part of the Kanyen’kehá:ka or Mohawk Nation. The Mohawk Nation is in turn part of the Rotinonhsyón:ni (Haudenosaunee or Six Nations Confederacy).
3. The territory of the MBQ represents one of the largest First Nations territories in Ontario located on the Bay of Quinte in Southeastern Ontario, formally recognized as the Tyendinaga Mohawk Territory (“TMT” or the “Territory”). Traditional lands of the Six Nations, encompassing the Territory, was set aside for the Six Nations in 1793 through the “Simcoe Deed”, also known as Treaty 3½ which granted land “To the Chiefs, Warriors, Women and People of the Six Nations” for their loyalty and “in recompense of the losses” sustained by them as a result of the American Revolution.¹ The MBQ and their territory are subject to Aboriginal rights and interests protected by the *Constitution Act*, 1982.
4. Section 35(1) of the *Constitution Act* recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada and has been interpreted by the Supreme Court of Canada to require that where government actions or decisions (including those issued by regulatory tribunals) may adversely impact Aboriginal or treaty rights, a “duty to consult” may be triggered.²
5. Enbridge Gas Inc.’s (“Enbridge”) proposed Community Expansion Project (the “Project”) involves the construction of natural gas pipelines and facilities that are largely located within the Territory and as such trigger a duty to consult.
6. Pursuant to section 96(1) of the *Ontario Energy Board Act*, 1998, Enbridge must satisfy the *Ontario Energy Board* (“OEB” or the “Board”) that a proposed project is in the public interest. The Project’s potential affect on Aboriginal rights holders, creates a special public interest requiring that the Crown’s duty to consult be sufficiently discharged as part of the public interest.
7. The Ministry of Energy delegated its duty to consult to Enbridge, by a delegation letter.
8. Enbridge has worked collaboratively with MBQ and has meaningfully engaged with the MBQ community. Enbridge has fostered a positive relationship with MBQ through its consultation process and has demonstrated responsiveness to the community’s concerns.
9. At the completion date of the duty to consult, MBQ is supporting the approval of Enbridge’s application for leave to construct the Community Expansion Project. It is the MBQ’s submission that the successful outcome of the duty to consult is proceeding with the Enbridge applicant.

¹ *Simcoe Deed or Treaty No. 3 ½*, 1793, LAC RG10 Vol. 1840 IT 006 ff. 1-3 Reel T-9938; online at < <https://mbq-tmt.org/wp-content/uploads/2020/10/Simcoe-Deed-Transcript.pdf> >

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

10. MBQ is addressing primarily the first of the specific questions raised by the OEB: In light of section 36.2 of the OEB Act and Ont Reg. 2419, what factors must the OEB consider in determining the public interest pursuant to section 96(1)?

COMMUNITY NEED

11. Natural gas is Ontario's most common heating source.
12. MBQ has been actively seeking increased access to natural gas servicing within the Tyendinaga Mohawk Territory since 2015.³ The unequal distribution of access to natural gas has created a discrepancy within the community of those with access to affordable fuel and those without.
13. Community's interest and desire for access to natural gas was made evident through Enbridge's extensive consultation with MBQ and the Township. In collaboration with MBQ, Enbridge conducted in-person outreach initiatives and created a questionnaire to determine the level of interest within the community in converting to natural gas.⁴ The results of the outreach and questionnaire have been overwhelmingly positive and in favour of the project, a finding that is consistent with MBQ's own experience with its members and constituents.⁵ Alternatives such as heat pumps with these subsidiaries have been available in the Territory with little taken up.
14. Where a clear and demonstrable interest in natural gas services within a community is established (through market research survey results, outreach etc.), the Natural Gas Expansion Program ("NGEP") was created to assist municipal and Indigenous governments with the means to provide access to natural gas for their residents.
15. The NGEP was created under the *Access to Natural Gas Act, 2018* to help expand access to natural gas to areas of Ontario that currently do not have access to the natural gas distribution system. As part of Phase 2 of the NGEP process, the Government of Ontario announced that 28 projects across 43 communities were selected for funding under Phase 2 of the NGEP. The Project and its coverage within the Tyendinaga Mohawk Territory were one of these territories selected for funding.⁶
16. The support for the Project by the Government of Ontario through the NGEP is further evidence of the present and continuing need for increased access to natural gas within the MBQ community.
17. The MBQ Project will make natural gas available to approximately 151 customers in the community of the MBQ First Nation and 28 residential customers in Tyendinaga Township.

³ Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, p.2

⁴ Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, p.2 and Attachment 3

⁵ Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, Attachment 5

As of October 12, 2022, Enbridge has received 68 responses to its questionnaire, showing 97% of respondents are in favour of the Project. Likelihood to convert was 34% (extremely likely), 34% (very likely), 22% (likely) and 10% (not very likely and not at all likely). 73% would convert within the first 12 months, with 9% within 1-2 years and 16% after 3 years.

⁶ *Ibid.*

18. In a letter dated September 15, 2022 MBQ expressed its support of providing its community members with improved access to natural gas through the MBQ Project.⁷ MBQ Chief and Band Council have also provided a letter of intent to convert all 24 band-owned properties to natural gas⁸, which addresses in part the issue of take up or demand.

OEB FRAMEWORK and the PUBLIC INTEREST

19. The Board is empowered and required pursuant to section 96 of the *Ontario Energy Board Act*, 1998 (the “*Act*”) to consider whether a proposed construction project is in the public interest.⁹ Only if the Board is satisfied can a project be approved.
20. When determining whether a project is in the public interest, the Board typically examines the need for the project, the economics of the project, the environmental impact and the impact on land owners.¹⁰
21. In determining the need for the project, the Board has consistently highlighted the importance of the *Access to Natural Gas Act*, 2018 and its implementation program, the NGEF. This extends from the fact that the legislation and regulations that enable the NGEF were established to further the public interest in tandem with the Board’s objectives to facilitate the rational expansion of natural gas distribution systems.¹¹
22. While approved projects do not automatically satisfy the Board’s section 96 obligations to consider the public interest under the *Act*, the Board has consistently applied a significant degree of deference to those projects that have obtained NGEF approval.¹² The MBQ Project’s approval for NGEF provides strong evidence of a need for the community for natural gas to be extended to its unserved areas.
23. Given the Project’s potential effect on Aboriginal rights holders, this creates a special public interest that may only be met when the duty to consult has been sufficiently discharged.¹³

DUTY TO CONSULT

24. The Crown’s duty to consult and accommodate Indigenous people when there is a possibility that asserted Indigenous rights or title may be adversely impacted by proposed conduct is well-established in case law.¹⁴

⁷ Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, p.2

⁸ Applicant Material – MBQ (EB-2022-0248), Exhibit B-1-1, Attachment 5

⁹ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, s. 96(1) [*Act*]

¹⁰ *Enbridge Gas Distribution Inc., Re*, 2007 Ontario Energy Board, CarswellOnt 12177

¹¹ *Ontario Energy Board 5-Year Strategic Plan*, 2021/2022 < <https://www.oeb.ca/sites/default/files/OEB-Strategic-Plan-2021-22-to-2025-26.pdf> >

¹² See EB-2022-0088 at p.4-6.

¹³ See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [Sekani] 2010 SCC 43 at para 70; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* 2017 SCC 40, para 40.

¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 [*Haida Nation*] at paras 26-28.

25. The duty to consult Aboriginal rights holders or rights claimants and that duty's content is derived from the fact that:

...Canada's Aboriginal peoples were here when Europeans came, and were never conquered...[t]he potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected.¹⁵

26. The Crown's duty to consult Aboriginal interests arises when all three of the following elements are satisfied: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) the Crown contemplates conduct; and (3) such conduct may adversely affect an Aboriginal right or claim.¹⁶
27. The nature or content of the Crown's duty "varies with the circumstances" and lies on a "spectrum" informed by two factors: "the strength of the case supporting the existence of the right," and "the seriousness of the potentially adverse effect upon the right or title claimed."¹⁷
28. Chapter 3.2 of the guidelines for the location, construction and operation of hydrocarbon pipelines Guidelines (the "Guidelines") outline the structure in OEB proceedings meant to ensure that the duty to consult and accommodate Indigenous groups ("DTCA") has been discharged.¹⁸ The Guidelines state that the Ministry of Energy (the "MOE") will coordinate the Crown's DTCA obligations that may be triggered by applications for leave-to-construct.¹⁹ Where the DTCA is triggered, the MOE will delegate the procedural aspects of consultation to the applicant.
29. In a letter dated April 7, 2022 the MOE issued its determination that the proposed Project may have the potential to affect Indigenous communities and as such delegated the procedural aspects of consultation in respect to the Project to Enbridge.²⁰ Enbridge received a Delegation Letter from MOE for the Project indicating that the MOE had delegated the procedural aspects of consultation to Enbridge.
30. In their letter delegating the procedural aspects of consultation, the MOE provided the Crown's preliminary assessment of the level of consultation required for the MBQ, requiring that Enbridge undertake a deeper level of consultation at the higher end of the spectrum. In its direction to Enbridge, the MOE set a higher consultation threshold and indicated that they would be overseeing their efforts;

...in assessing the sufficiency of consultation, the Crown will evaluate whether mitigation and accommodation measures proposed by Enbridge are sufficient.

¹⁵ *Ibid.*, at para 25.

¹⁶ Sekani, *Supra* note 11 at para 31.

¹⁷ *Haida Nation*, *supra* note 1 at para 39.

¹⁸ Ontario Energy Board, *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario*, 8th Ed. (2023) at p.1 [Guidelines].

¹⁹ *Ibid.*, at pp 17-18.

²⁰ Applicant Material - Exhibit H-1-1, Attachment 2 MBQ (EB-2022-0248)

31. Enbridge filed its Indigenous Consultation Report (“ICR”) for the Project with the MOE on December 20, 2022 which was also filed with the Board as part of its application.
32. Enbridge’s Indigenous engagement program was the product of extensive consultations with the MBQ and based on the adherence to the OEB’s Guidelines and Enbridge’s company-wide *Indigenous People Policy*.²¹ After consulting with the MBQ, the preferred method of gauging community interest in converting to natural gas within the community was determined to be in-person delivery both at the Fall Fair and door-to-door. A questionnaire was developed which requested information pertaining to dwelling characteristics, current fuel type and interest in converting to natural gas-fueled appliances or other fuel types and appliances.
33. As part of its consultation efforts, Enbridge has provided MBQ with fulsome information in the form of (i) detailed descriptions of the nature and initial scope of the Project; (ii) list of other provincial/federal approvals that may be required for the Project; (iii) maps of the Project location; (iv) information regarding the Virtual Open House; (v) Environmental Report, providing information about the potential effect of the Project on the Environment, including archaeological assessments.²²
34. Enbridge has met with MBQ multiple times including virtual and in-person meetings throughout the length of the application process. MBQ’s comments, concerns and opinions have been regularly solicited and have meaningfully been answered and/or addressed.²³
35. Given that portions of the Project will be located on the Tyendinaga Mohawk Territory, Certificate of Possession holders may be potentially affected. As such, MBQ has received and is satisfied with an undertaking provided by Enbridge to provide ongoing engagement with potentially affected Certificate of Possession holders as directed by MBQ Chief and Council.
36. MBQ does not have any outstanding concerns regarding the Project at the writing of these submissions and accepts the evidence and findings that furnish an updated ICR Summary Table as of April 13, 2023 was provided to the MOE.²⁴
37. On April 25, 2023, the MOE provided Enbridge with a letter of opinion regarding the sufficiency of its consultation with MBQ, writing that “...based on this review of material and our outreach to Indigenous communities...[the MOE]...is of the opinion that the procedural aspects of consultation

²¹ *Enbridge Inc. Indigenous Peoples Policy*, August 2022 <
https://www.enbridge.com/-/media/Enb/Documents/About-Us/indigenous_peoples_policy_final.pdf?rev=839a88ff9657465aa0b039d139d98166&hash=09283580A3CAE4273D54B0B7D7BA1A51>

²² MBQ (EB-2022-2048) Exhibit I.Staff.10 parts d) and e).

²³ MBQ has expressed concerns regarding nitrogen and hydrostatic testing, vegetation, re-establishment monitoring, reclamation and contamination protocol. MBQ has also inquired about the feasibility of avoiding the use of open cuts in the construction process and aligning work with the community’s infrastructure plans and has advised Enbridge of sensitivities around the Mud Creek on Slash Road and the Salmon River. Enbridge has provided MBQ with responses to these comments and has undertaken to continue to engage with the community in relation to the Project. See Exhibit H-1-1, Attachment 6, Line Item 10.73.

²⁴ *Ibid.*, Exhibit H-1-1, attachment 6.

undertaken by Enbridge to-date for the purposes of the Ontario Energy Board's Leave to Construct for the Project are satisfactory".²⁵

DISCHARGE OF DUTY and JUDICIAL DEFERENCE

38. The Crown's ability to discharge its duty to consult through the OEB process is well-established in law. In *Chippewas of the Thames First Nation v Enbridge Pipeline Inc.*, and the companion case of *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, the Supreme Court of Canada confirmed that the Crown may discharge its duty to consult and accommodate through an existing statutory tribunal process.²⁶
39. The OEB framework contains the procedural powers to refuse to grant Enbridge leave to construct should the Board find that the duty to consult is not adequately discharged in relation to a proposed project.²⁷ Its powers also include the ability of the OEB to award costs to facilitate meaningful participation of Indigenous groups in the process and the ability to impose conditions should leave to construct ultimately be granted.
40. Enbridge has demonstrated respect and concern for the MBQ community and has engaged with both representatives and members to facilitate dialogue and input. Enbridge has worked collaboratively with MBQ to address outstanding concerns with the Project's potential impacts on MBQ's rights and has undertaken to provide ongoing consultation and support. Enbridge has demonstrated its responsiveness to the concerns of the community and its willingness to work with MBQ towards appropriate accommodation measure.
41. In light of the positive relationship that Enbridge and the MBQ have been building and Enbridge's willingness to work collaboratively with MBQ on the accommodation of impacts, MBQ fully supports the Project's approval.
42. As the pipeline in question will be constructed on the physical territory of the MBQ established by the treaty with the MBQ, as such it is MBQ's position that this requires the deeper end of the spectrum of consultation.²⁸ The results of such consultation, that is the support of the MBQ for the application and the very high interest of members of the MBQ to convert to gas, supports a high level of attachment.
43. This is not merely a "box ticking" exercise as it appears to be treated by some of the parties to this application. This application is being lumped in and treated the same as the other two applications which do not impact treaty rights directly, as does this application. None of the submissions of any

²⁵ MBQ (EB-2022-2048) Exhibit I.Staff.10 parts d) and e).

²⁶ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 (S.C.C.)

²⁷ OEB, *Natural Gas Facilities Handbook*, March 31, 2022, at 4.4.6, <

<https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2022-03/OEB-Natural-Gas-Facilities-Handbook-20220331.pdf>>

²⁸ At the deeper end of the spectrum, the consultation required may entail the opportunity to make submissions for consideration, formal participation in the decision-making process and provision of written reasons to show that Aboriginal concerns were considered, and to reveal the impact they have on a decision. *Ibid*, at para. 43.

of the other intervenors to date have addressed the application of the outcome of the duty to consult; that is the support of the MBQ for the application. This is deeply troubling for the MBQ. With all 3 applications being lumped together and being treated the same, with identical submissions, and with only Enbridge addressing the duty to consult, this gives the impression that mere lip service is being given to the duty to consult and the outcome thereof. Very little if any weight should be given to any submissions which do not address this fundamental issue.

44. It is the MBQ's position that the OEB must accommodate the outcome of the duty to consult where possible. MBQ recognizes there is a balancing between the general public interest and the special public interest arising out of the duty to consult. However, the outcome of the special public interest; i.e.—the duty to consult in this case, is in support of the Application and considerable deference should be given to the outcome of this duty to consult. It should be only the most extraordinary circumstances where the OEB refuses to follow the outcome of the duty to consult; i.e.—support of the Enbridge application. There is no such overwhelming grounds advanced here by either the proponent or the opponents of the Application. This Application is clearly different from the other two applications in this regard.

CONCLUSION

45. There is a present and ongoing need and desire within the MBQ community for increased access to natural gas.
46. The MBQ Community Expansion Project has the potential to provide affordable natural gas options to a currently partially unserved community.
47. Enbridge has satisfied its constitutional duties to meaningfully engage and consult with the MBQ community and as such discharged the duties of the Crown.
48. MBQ supports the approval of Enbridge's application for leave to construct the Community Expansion Project.
49. Given the outcome of the duty to consult is MBQ's support of the Application by Enbridge, and given the special deference that should be paid to the outcome of the duty to consult, this Application should proceed.