March 25, 2024

VIA RESS

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

Dear Ms. Marconi,

Re: Invitation to comment on proposed revisions to the Indigenous consultation provisions of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario ("Environmental Guidelines") and Request for responses to questions related to participation by Indigenous groups in OEB hearings
Board File Nos: EB-2024-0079 and EB-2022-0011

We are counsel to Minogi Corp. ("**Minogi**"), a wholly owned corporation of the Mississaugas of Scugog Island First Nation, in the consultations on (i) proposed revisions to the Indigenous consultation provisions of the Ontario Energy Board's ("**OEB**" or "**Board**") Environmental Guidelines (the "**Environmental Guidelines Consultation**") and (ii) the process for participation by Indigenous groups in OEB hearings (the "**Indigenous Participation Consultation**"). Minogi submits these comments on the Environmental Guidelines Consultation and the Indigenous Participation Consultation pursuant to the Board's letter dated February 7, 2024.

This submission is endorsed by the following members of the Mississauga Nation: Alderville First Nation, the Mississaugas of the Credit First Nation, and the Mississaugas of Scugog Island First Nation (together, the "**Mississauga Nation Members**"). The Mississauga Nation Members all signed a historic Mississauga Nation relationship accord on October 29, 2016 (the "**Accord**"). The Mississauga Nation Members are comprised of Anishnaabe people who have shared cultures, languages, histories, traditions, values, beliefs, and aspirations. Through the signing of the Accord, the signatories agree to work collaboratively and inclusively on a range of agreed-upon issues and initiatives of common interest or concern among the parties.

The Mississauga Nation Members are deeply concerned that the proposed changes would effectively remove the Minister of Energy ("the **Minister**") from the consultation process without an effective replacement to ensure that meaningful consultations with First Nation partners take place in accordance with the Crown's constitutional obligations.

In particular, the proposed changes fail to recognize the importance of the government's oversight and eventual endorsement (or lack thereof) of consultations. They would leave First Nations without effective recourse to their proper interlocutor and partner, deprive them of the expertise and challenge function that effective government can bring to discussions with project proponents, and ultimately leave the provincial government far less accountable for the quality of consultations absent an application for judicial review, which is a recourse that is practically unavailable to many First Nations.

Additionally, the Mississauga Nation Members believe that both the Environmental Guidelines Consultation and the Indigenous Participation Consultation should be used as an opportunity to improve access to capacity funding at all material consultation points throughout the project approval process and any other proceeding that involves First Nation rightsholders.

We elaborate on these themes in the sections that follow.

The Mississauga Nation Members

The Mississauga Nation Members have traditional territory, treaty rights and other associated rights and interests protected by the *Constitution Act, 1982*. The Mississauga Nation Members are therefore deeply interested in the current Environmental Guidelines Consultation and seek to ensure that the consultation's outcomes protect the ability of Ontario First Nations to be active participants on matters that impact the lands and water of their traditional territories, in accordance with their constitutional entitlements and their roles as custodians and stewards of those territories.

Overview of the Mississauga Nation Member's Position on the Proposed Changes to the Environmental Guidelines

The Mississauga Nation Members oppose the proposed changes to the Environmental Guidelines on the basis that they effectively remove the Minister and the Ministry of Energy (the "**Ministry**") from the consultation process without an effective replacement to ensure that meaningful consultations take place and that appropriate accountability on the part of the Crown is maintained. The proposed changes risk significant deleterious effects on the upholding of the honour of the Crown and the right of First Nations to be *meaningfully* consulted and *reasonably* accommodated when hydrocarbon projects impact their Aboriginal and Treaty rights, land, water, culture, traditions, beliefs, people, and communities (collectively, "**Rights**"). The following consequences are particularly concerning, as we detail in the remainder of this submission. The proposed changes:

(a) remove important existing oversight functions of the Ministry;

(b) limit the support functions of the Ministry in guiding and ensuring adequate consultation occurs prior to project approval;

(c) remove existing and cost-effective challenge features available to First Nations;

(d) deprive First Nations of the Ministry and the Minister's expertise and knowledge in relation to the duty to consult and accommodate ("**DTCA**");

(e) deprive First Nations of an important challenge function that effective government and engagement can bring to discussions and consultations with project proponents;

(f) leave the provincial government unaccountable for the quality of consultations at all material times before an application for judicial review, which is a recourse that is practically unavailable to many First Nations;

(g) leave the OEB without adequate processes in advance of the Board's adjudication of the matter to determine whether the DTCA has been discharged and/or to require a proponent to fulfil its delegated procedural consultation responsibilities;

(h) diminish the Nation-to-Nation relationship between First Nations and the Crown by effectively absenting the provincial government from the consultation process unless a First Nation is willing and able to undertake an application for judicial review following inadequate consultations; and

(i) do not provide a capacity funding framework that supports meaningful consultation and First Nation participation.

The Proposed Amendments Remove Important Existing Oversight, Support, and Challenge Features

The proposed amendments remove important oversight, support, and challenge functions of the Ministry that are currently available to impacted First Nations when the DTCA arises. These functions allow First Nations to be made aware of the potential impacts on their Rights, advance their positions with project proponents, and involve the Ministry when issues related to the adequacy of meaningful consultation and/or reasonable accommodation occur.

The current process allows First Nations to approach the Ministry when issues arise during the pre-approval period and have their views and concerns addressed prior to the issuing of the Minister's letter indicating the (in)adequacy of consultations. The Ministry's oversight of the consultation process also effectively represents a cost-effective support function that the OEB may not be capable of fulfilling since the Ministry's questions and involvement can represent effective direction to project proponents prior to any application for Board approval. It is also unclear, absent more detail, how the OEB would propose to assume oversight and coordination functions in a way that would also preserve its role as an impartial and unbiased regulator and decision-maker.

The challenge function that forms part of the current DTCA regime enables First Nations to approach the Ministry for assistance with ensuring that consultations are meaningful long before a project proponent applies to the OEB for project approval. However, the proposed amendments would remove this challenge function and require First Nations to participate, at significant cost, in OEB proceedings which may not benefit from Ministry oversight regarding the adequacy of consultations. There is currently no mechanism within the OEB that provides this important oversight and challenge function with the institutional support of the government. Instead, the

proposed amendments would mean that questions to project proponents and positions taken by OEB staff related to the issues identified by First Nations during a proceeding would remain discretionary unless adopted in a decision by the Board.

The Proposed Amendments Deprive First Nation Consultations of the Ministry's Expertise Without Ensuring Adequate Alternative Arrangements Towards Ensuring the DTCA Has Been Discharged

Discharging the procedural and substantive aspects of the DTCA requires significant institutional knowledge, expertise, and capacity that is currently not available through or at the OEB. The proposed amendments do nothing to ensure that the OEB is institutionally capable of assessing the constitutional requirements of adequate consultation and fulfilment of the Crown's DTCA. Further, the proposed amendments do not provide any new mechanisms, processes, programs, employee knowledge and capacity building that would enable the OEB to guide and assess the adequacy of First Nation consultation.

An important aspect of the delegation of both the DTCA and the determination of the adequacy of consultations is that the regulatory agency's statutory powers must be sufficient in the circumstances and/or the agency itself provides adequate consultation and accommodation. Where this is not the case, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the DTCA prior to project approval.[1] The proposed amendments make no mention of how the OEB intends to satisfy this requirement or what other avenues will be available to First Nations to ensure adequate consultation and accommodation.

The current DTCA regime involves the Ministry in the consultation process and ensures that members of the civil service at the Ministry with knowledge of the requirements of the Crown's DTCA are directly involved in discussions, meetings, correspondence, and consultations with First Nations and project proponents. The performance of these functions requires that the Ministry has experience overseeing and coordinating meaningful and adequate First Nation consultations. This function should not be eliminated without alternate provisions, none of which are provided in the proposed amendments.

In addition, it is unclear and unlikely that the OEB, OEB Commissioners, or OEB staff are able to perform these functions while also acting as an impartial and unbiased regulator and decision-maker in relation to the same issues.

The Proposed Amendments Undermine the Nation-To-Nation Relationship

It remains unclear what role the Ministry ultimately plays in ensuring that the Crown's duty to meaningfully consult and reasonably accommodate, on a Nation-to-Nation basis, is fulfilled. The proposed amendments do nothing provide clarity on this issue. The Ministry appears to be removing itself from the process and likely would only become involved where a First Nation seeks to have a decision of the OEB judicially reviewed. This would add significant barriers and costs

[1] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, para 32.

likely beyond the means of many First Nations and would undermine the unique relationship between the Crown and First Nations as equal partners.

The Truth and Reconciliation Commission of Canada has issued *Calls to Action* that support the Nation-to-Nation relationship and direct all orders of government in Canada, including agents like the OEB, to recognize and implement UNDRIP.[2] The Board, as an administrative body overseeing and adjudicating such processes, must ensure that the right of First Nations to participate is recognized and that the Board's processes, including those contemplated in the Environmental Consultation and the Indigenous Participation Consultation, are compatible with implementing and protecting the rights recognized under UNDRIP.[3] Accordingly, the OEB must resist attempts to undermine reconciliation and eviscerate the Nation-to-Nation relationship.

The proposed amendments limit the Ministry's role to the initial identification of potentially impacted First Nations and enable the Ontario government to wash its hands of its integral role in ensuring adequate consultations and accommodations. This is contrary to upholding the honour of the Crown and the Crown's unique relationship with First Nations. The attempts to eliminate the Nation-to-Nation relationship is deeply troubling to the Mississauga Nation Members and is at odds with the principles underlying the DTCA and developing frameworks like UNDRIP.

A Capacity Funding Requirement and Framework is Required to Ensure First Nation Participation

There are 133 First Nation governments in Ontario. The Board is likely aware of the often very limited engagement by First Nations in most proponent consultations and OEB proceedings and consultations, regardless of whether their Rights may be specifically or generally affected. First Nations face significant barriers and risks related to costs associated with intervening in Board proceedings and consultations and engaging with project proponents seeking to satisfy the OEB's consultation requirements under the Environmental Guidelines. A robust and equitable participation process must include adequate and accessible capacity funding throughout all phases, including prior to an application to the OEB by a project proponent, during any OEB-led process, and after the OEB renders a decision.

Costs associated with intervening in Board proceedings, including the risk that costs may be challenged or only partially covered by the Board's cost award, are often prohibitive for many First Nations in Ontario. This limits the ability of First Nations to meaningfully participate and engage with project proponents, the OEB, and their own communities. This often means that First Nations are reluctant to fully engage in Board proceedings and consultations or with project proponents. In addition, the capacity barriers faced by many First Nations result in limited consultation with project proponents, even where there are significant impacts on a First Nation's Rights. This results in determinations that consultations have been *de facto* adequate regardless of whether

[2] Truth and Reconciliation Commission of Canada, *Calls to Action*, Call to Action 42, available online at: < http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.
[3] See UNDRIP, arts. 18, 19, and 27.

this is true, as First Nations do not have the capacity to fully and meaningfully engage with every project proponent and process that may infringe or impact their Rights.

The proposed amendments are not consistent with the best practices of other agencies and regulators which have already put in place programs and supports to enable *meaningful* First Nation participation and ensure the DTCA is fulfilled. This includes the Impact Assessment Agency of Canada ("**IAAC**"), Canada Energy Regulator ("**CER**"), Canadian Nuclear Safety Commission ("**CNSC**"), Fisheries and Oceans Canada, and Transport Canada. The Board should consider adopting and/or adapting programs and approaches to capacity funding developed by these agencies, such as:

- IAAC's Indigenous Capacity Support Program, which provides funding to Indigenous communities and Indigenous organizations to support meaningful engagement in consultations;
- CER's Indigenous Advisory Committee, which advises the CER on improving and enhancing the involvement of Indigenous peoples and organizations regarding CER-regulated pipelines, transmission lines and offshore renewable energy projects, as well as abandoned pipelines; and
- CNSC's Indigenous and Stakeholder Capacity Fund, which provides support to Indigenous Nations and communities and public stakeholders and is not tied to a specific CNSC licensing decision or regulatory process.

The Board should also consider adopting and/or adapting the approach of the British Columbia Utilities Commission ("**BCUC**"), an independent regulatory agency of the Government of British Columbia. On August 31, 2023, BCUC launched a pilot program called the Indigenous Intervener Capacity Fund ("**IICF**"), which provides upfront capacity funding to Indigenous intervenors in BCUC proceedings. The IICF offers up to $5,000 to Indigenous governments and organizations to support their engagement in BCUC proceedings. These funds can be utilized for activities such as hosting community meetings, providing honoraria, conducting research, and paying professional fees. The IICF aims to provide Indigenous intervenors with the *necessary* support to participate fully in BCUC proceedings.

The Board's current efforts to facilitate participation through the awarding of costs is inadequate and inappropriate when considering the realities of many First Nations. The Board must revise and amend its current cost recovery mechanism to provide capacity and participation funding to First Nations. Providing funding could be an additional means of ensuring more Indigenous voices are heard and more First Nations have the ability and capacity to effectively and meaningfully participate in Board proceedings and consultations. In this regard, we suggest amending the wording of the following sentence in the Environmental Guidelines[4] as follows:

- Indigenous communities that have outstanding concerns about the impact of a Hydrocarbon Project application before the OEB on their ~~Section 35 R~~rights are encouraged to seek capacity funding, cost eligibility and intervenor status in the proceeding.

[4] See page 2 of Appendix C of OEB's letter dated February 7, 2024.

This suggested rewording – coupled with a new capacity and participation funding mechanism – would clearly indicate institutional support for First Nations to participate and intervene whenever their Rights are impacted.

Concluding remarks

These comments set out why the proposed amendments should be rejected and are supportive of further consultations with First Nations to develop an appropriate DTCA regime that respects the Nation-to-Nation relationship and upholds the honour of the Crown. The Mississauga Nation Members would therefore support an approach under the Environmental Guidelines that requires the Ministry to expressly recognize the authority of the OEB as an impartial adjudicative body as part of any endorsement of a delegated consultation process that it submits to the OEB for consideration. This express recognition should:

(a) outline the separate roles of the OEB, the Minister, and the Ministry;

(b) provide the statutory grant of power to the OEB that is relied upon to determine the adequacy of consultations and accommodations;

(c) set out the procedural aspects of the DTCA; and

(d) provide a process and/or remedies to ameliorate any deficiencies and/or concerns identified by First Nations *prior* to an application by the project proponent for project approval, including a determination of the substantive aspects of the DTCA, with the OEB or another appropriate government body.

Sincerely,

DT Vollmer, Resilient LLP, Counsel for Minogi

c.
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Chief Bog Chiblow, Mississauga First Nation
Chief Keith Knott, Curve Lake First Nation,
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