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February 5, 2025

Ms. Nancy Marconi

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

Dear Sir/Madam,

Re: File No. EB-2024-0142

Hydro One Networks Inc. Application for Authority to Expropriate Land Interests with respect to certain lands owned by Nyon Oil Inc. and 1170367 Ontario Inc. in Port Colborne, Ontario

We are counsel to Nyon Oil Inc. ("**Nyon**") and 1170367 Ontario Inc. ("**117**"). We understand that Hydro One Networks Inc. ("**Hydro One**"), recently filed an Application for Authority to Expropriate Land Interests with respect to certain lands owned by Nyon and 117 in Port Colborne, Ontario (the "**Application**"). The Application bears File No. EB-2024-0142.

The subject land owned by Nyon and 117 is legally described as: Parts 1, 2, 3, 4 and 5, Lot 24, Concession 4, Plan 59R-15310 (the "Con 4 Lands") and Parts 2, 3, 4, 12 and 13, Lots 17, 18 and 19, Concession 5, Plan 59R-15312 (the "Con 5 Lands") (the Con 4 Lands and the Con 5 Lands, collectively the "Lands"). R Plans identifying the Lands and transmission infrastructure are set out at Schedule A.

Hydro One does not own some of the transmission infrastructure on the Lands. This is a unique circumstance, in that, normally, Hydro One would be the owner of transmission infrastructure affixed by it, or its predecessors, to the land of another, by virtue of s. 44 of the *Electricity Act, 1998*, SO 1998, c 15, Sch A. However, here, that is not the case.

Hydro One and its predecessors, have operated some of the transmission infrastructure affixed to the Con 4 Lands for over a century. On December 3, 1965, pursuant to an Order in Council issued by the federal government, Transport Canada issued Notice of Expropriation File No. 36-76-2G under the *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242 (the "SLSA"), which expropriated the entirety of the Con 4 Lands, and included the transmission infrastructure that was affixed to those lands. This expropriation was completed prior to the *Electricity Act*, 1998 coming into force, and is paramount to that statute regardless – to the extent that the statutes conflict, the federal statute governs.





Similarly, on December 10, 1968, pursuant to an Order in Council issued by the federal government, Transport Canada issued Notice of Expropriation File No. 36-76-2-0 under the SLSA, which expropriated the entirety of the Con 5 Lands, and included the transmission infrastructure that was affixed to those lands.

In short, due to the federal expropriations in the 1960s, the transmission infrastructure affixed to the Lands at the time of those federal expropriations transferred to the federal government, and then passed, through the chain of title, to our clients – Nyon and 117.

Nyon and 117 have issued and served a Statement of Claim seeking relief in the form of declarations that they are the owners of the transmission infrastructure on their respective lands (among other things). A copy of their Statement of Claim is attached hereto as **Schedule B**. Hydro One has served a Statement of Defence, which is attached hereto as **Schedule C**.

Hydro One has taken the position that, notwithstanding the federal expropriations in the 1960s, it owns the transmission infrastructure by virtue of the *Electricity Act, 1998*, and therefore the infrastructure is not included in Hydro One's OEB Application, since it already owns it. Hydro One has made it clear that their position is that they are only expropriating the lands that the transmission infrastructure is affixed to, and not the transmission infrastructure itself. Nyon's and 117's position is that the 1998 legislation did not strip them of their property rights in the transmission infrastructure, which were created in the 1960s, and that any application to expropriate their lands must include the transmission infrastructure affixed to those lands.

The application to expropriate before the OEB cannot proceed until it is determined what Hydro One is expropriating. If the Superior Court of Justice confirms that Nyon and 117 are the owners of the transmission infrastructure affixed to their lands, then a second expropriation hearing before the OEB will be necessary to address the transmission infrastructure. Nyon and 117 respectfully request that the OEB adjourn the Application *sine die* until the matter before the Superior Court of Justice is finally disposed of. This will prevent duplicate proceedings and an unnecessary second hearing before the OEB, which will be required if our clients are correct regarding their ownership of the transmission infrastructure.

Yours very truly,

**MASSEY LLP** 

Scott Lemke

SGL/ac

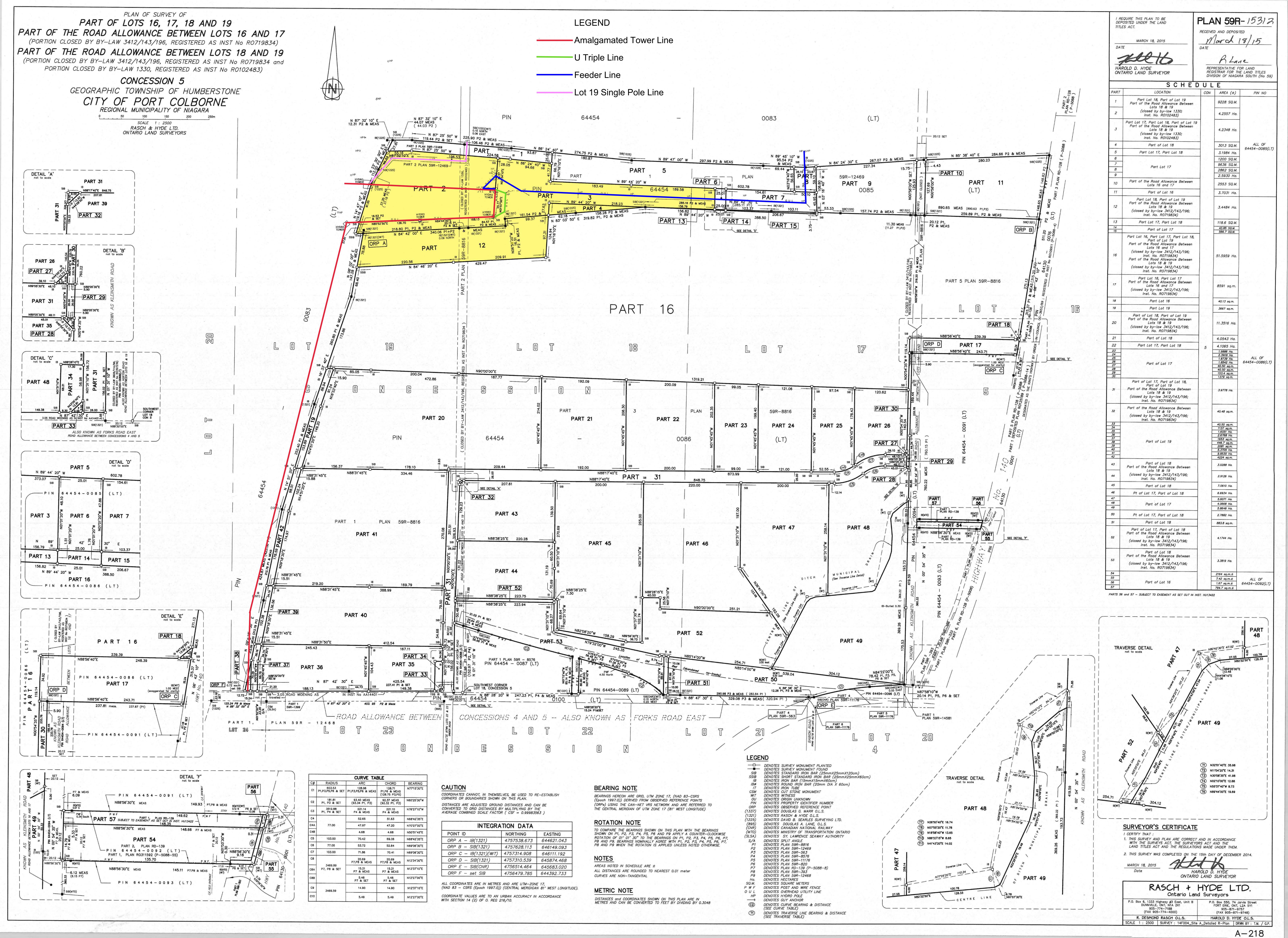
c. Gordon Nettleton – <a href="mailto:gnettleton@mccarthy.ca">gnettleton@mccarthy.ca</a>

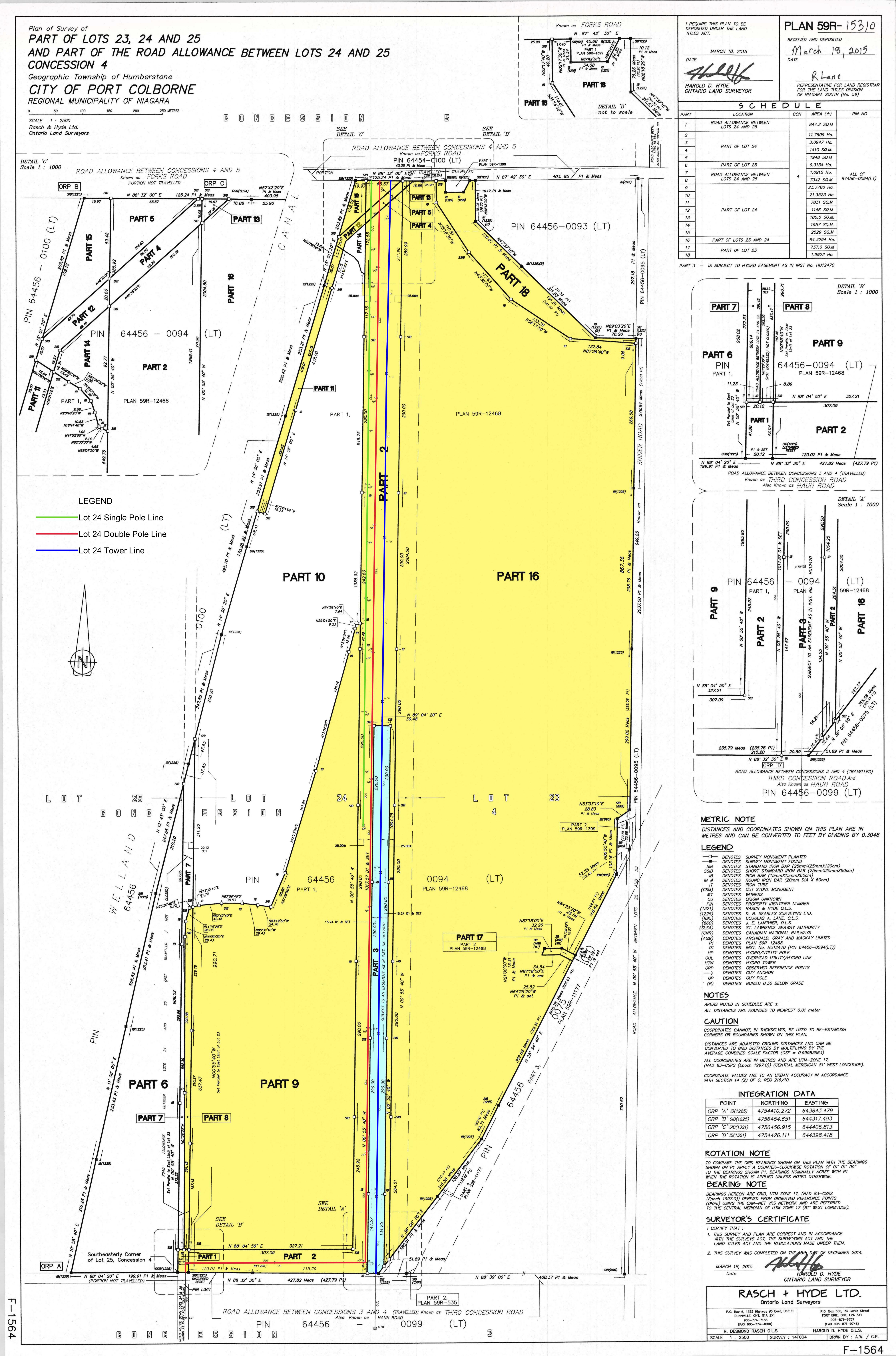
c. Sam Rogers – srogers@mccarthy.ca



## Schedule A

Plan 59R-15310 identifying the Con 4 Lands and transmission infrastructure thereon Plan 59R-15312 identifying the Con 5 Lands and transmission infrastructure thereon







## Schedule B

Statement of Claim

## ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

NYON OIL INC. and 1170367 ONTARIO INC.

**Plaintiffs** 

and

HYDRO ONE NETWORKS INC.

Defendant

#### STATEMENT OF CLAIM

Notice of Action issued on February 21, 2024

- 1. The Plaintiffs claim the following relief:
  - (a) Damages in the amount of \$56,483,814.37 as overdue and outstanding rent and interest from September 15, 2015 to March 31, 2024;
  - (b) An order that the Defendant pay monthly rent, as of April 1, 2024 in the amount of \$314,330.66 monthly (being \$157,165.33 with an overholding premium of 100% in accordance with ss. 58 and 59 of the *Commercial Tenancies Act*), together with interest on overdue amounts calculated at 19.56% compounded annually;
  - (c) An order that the Defendant pay all taxes, assessments, and levies charged by any authority having jurisdiction for which the Defendant was obligated to pay but refused or neglected to pay;

- (d) A declaration that the Plaintiffs are the owners of the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands (as defined below);
- (e) A declaration that the Defendant has no right, privilege or permission to the use the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands;
- (f) A declaration that the Defendant's use, maintenance and operation of the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands is a trespass;
- (g) A permanent injunction restraining the Defendant from trespassing upon the Plaintiffs' Lands for the purpose of constructing, operating, maintaining or renewing any hydroelectric fixtures or infrastructure thereon;
- (h) A declaration that the Master Agreement and Supplemental Agreement (as defined below) have been terminated;
- (i) A declaration that the Feeder Line Licence (as defined below) has been terminated;
- (j) An order that the Defendant complete an environmental site assessment of the Plaintiffs' Lands and the adjacent lands, which shall include, but not be limited to, surface, subsurface and ground water samples, by a qualified person, appointed by the Court, at the expense of the Defendant;

- (k) An order that an independent detailed study for contaminants, in, on, and under the Plaintiffs' Lands, and the adjacent lands, be completed by a qualified person, chosen by the Court, and at the expense of the Defendant;
- (I) An order that the Defendant provide all records that may be relevant to any environmental contamination of the Plaintiffs' Lands or the adjacent lands;
- (m) An order that the Defendant compensate the Plaintiffs for environmental contamination of the Plaintiffs' Lands and the adjacent lands in accordance with the *Environmental Protection Act*, R.S.O. 1990, c. E.19;
- (n) An order that the Defendant remediate the Plaintiffs' Lands and adjacent lands to a pristine state;
- (o) A permanent injunction restraining the Defendant from using prohibited and toxic environmental contaminants on the Plaintiffs' Lands or any adjacent lands;
- (p) Prejudgment interest at a rate of 19.56%, or in the alternative, in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (q) Post-judgment interest at a rate of 19.56%, or in the alternative, in accordance with section 129 of the *Courts of Justice Act*;
- (r) The costs of this proceeding, plus all applicable taxes; and

(s) Such further and other Relief as to this Honourable Court may deem just.

#### The Parties

- 2. The Defendant, Hydro One Networks Inc. ("**HONI**") is a corporation controlled by the Ontario provincial government and governed by the laws of Ontario. HONI is the largest electricity transmission and distribution company in Ontario, and is principally regulated by the Ontario Energy Board. HONI is a successor of Ontario Hydro and the Hydro-Electric Power Commission of Ontario.
- 3. Nyon Oil Inc. is a corporation incorporated under the laws of Ontario ("**Nyon**").
- 4. 1170637 Ontario Inc. is a corporation incorporated under the laws of Ontario ("117").

#### Overview

- 5. HONI operates hydroelectric fixtures and infrastructure on lands owned by the Plaintiffs, and has done so since approximately 1929. In 1965 and 1968, the hydroelectric fixtures and infrastructure were expropriated together with the subject lands by Transport Canada in the name of the St. Lawrence Seaway Authority (the "Seaway"). Upon expropriation, the fixtures and infrastructure became the property of the Seaway, and thereafter, the Seaway granted licenses to HONI to continue to maintain and use that infrastructure.
- 6. Ultimately, the lands, fixtures, and infrastructure, owned by the Seaway were transferred to the Plaintiffs, along with the licences.

- 7. HONI failed to live up to its obligations under the licenses, which included failing to pay rent and contaminating the Plaintiffs' Lands.
- 8. The licenses continued until September 2015, at which time the Plaintiffs gave notice that the licenses were being terminated, and that rent would be charged to HONI if they continued to use Plaintiffs' Lands, and the hydroelectric fixtures and infrastructure thereon. Notwithstanding the notices, HONI did continue to use the lands, hydroelectric fixtures and infrastructure, and refused or neglected to pay rent. This has resulted in significant arrears owing to the Plaintiffs.
- 9. In addition, the Plaintiffs' Lands are in need of environmental remediation as a result of HONI's use of long-lasting chemicals, such as arsenic trioxide, fuel oil, gasoline, PCBs, pentachlorophenol, and other substances to keep vegetation and wildlife off of the towers, poles and wires.

#### The Plaintiffs' Lands

- 10. This action concerns HONI's use of hydroelectric fixtures and infrastructure and various parcels of land owned by the Plaintiffs. The ownership of these lands, and their legal descriptions, are as follows:
  - (a) 117 owns Parts 2, 3, 4, 12, and 13, on Lot 17, 18, and 19, Concession 5,Plan 59R-15312 (the "117 Con 5 Lands").
  - (b) 117 owns Parts 1, 2, 3, 5, 8, 9, 15, 16, and 17 on Lots 23, 24 and 25,Concession 4, Plan 59R-15310 (the "117 Con 4 Lands") (the 117 Con 4

Lands and the 117 Con 5 Lands are collectively referred to herein as the "117 Lands").

- (c) Nyon owns Parts 4, 11, 12 and 13 on Lot 24, Concession 4, Plan 59R-15310 (the "Nyon Lands".)
- 11. The 117 Lands and the Nyon Lands are collectively referred to herein as the "Plaintiffs' Lands".
- 12. There are significant hydroelectric fixtures and infrastructure on the Plaintiffs' Lands. These fixtures and infrastructure consist of:
  - (a) a set of double poles and wires spanning approximately 7,100 feet north-south across Lot 24, Concession 4 (the "Lot 24 Double Pole Line");
  - (b) a set of single poles and wires spanning approximately 4,500 feet north-south across Lot 24, Concession 4, adjacent to the west of the Lot 24 Double Pole Line (the "Lot 24 Single Pole Line");
  - (c) a set of towers and wires spanning approximately 7,100 feet north-south across Lot 24, Concession 4, adjacent to the east of the Lot 24 Double Pole Line (the "Lot 24 Tower Line");
  - (d) an amalgamated tower line, which is as an amalgamation of the Lot 24

    Double Pole Line and the Lot 24 Tower Line, and enters upon Lot 19,

    Concession 5 from its west boundary and runs east for approximately 700

    feet and on to Lot 18 where it turns north to run approximately 200 feet, and

then it turns nearly 90 degrees west to run for approximately 700 feet again across Lots 18 and 19, Concession 5 forming a sideways "U" shape and then crosses over the Welland canal (the "Amalgamated Tower Line");

- (e) a set of single poles that anchor three wires and stem from the bottom of the "U" of the Amalgamated Tower Line on Lot 18, Concession 5, and that runs approximately 65 feet northeast, then north for approximately 100 feet, and then northwest for approximately 65 feet to reconnect to the north edge of the Amalgamated Tower Line (the "U Triple Line");
- (f) a set of single poles and wires that runs east-west for approximately 2,000 feet across Parts 2 and 3 on Lots 17 and 18, Concession 5, towards the northeast point of the sideways "U" of the Amalgamated Tower Line, then juts northwest for approximately 150 feet and expands to triple pole infrastructure, and then the lines jut southwest to another set of triple poles immediately below a tower on the Amalgamated Tower Line and approximately 60 feet west of the said tower, and then travel approximately 60 feet east to connect to that tower and join the Amalgamated Tower Line (the "Feeder Line"); and
- (g) a single pole line and wires that enter Part 2, Lot 19, Concession 5 from the north and run 40 feet south to a single pole and turns west and runs for approximately 520 feet and then juts southwest for approximately 265 feet

to connect to the tower on the Amalgamated Tower Line immediately adjacent to the Welland canal (the "Lot 19 Single Pole Line").

13. There are also various anchors tied in the Plaintiffs' Lands that secure the hydroelectric fixtures and infrastructure.

## The History of the Plaintiffs' Lands

- 14. The above-noted hydroelectric fixtures and infrastructure are located on a two-kilometer stretch of land adjacent to the east of the Welland Canal (the "Canal"). The Canal is now a relied upon shipping route that connects Lake Erie and Lake Ontario. For at least 90 years, some portion of the Plaintiffs' Lands has been used by HONI (or its predecessors) for the transmission of hydroelectric power.
- 15. The portion of the Canal adjacent to the west of the Plaintiffs' Lands was constructed in the late 1960s and early 1970s to bypass a 14.6 kilometer section of the Canal that travelled directly through Welland, Ontario. As part of the bypass project, approximately 6,500 acres of land was expropriated by the Seaway, including the property that is now the Plaintiffs' Lands.

## (a) The Expropriations

16. Beginning in December 1965, through a set of expropriations, the federal government took ownership of property that included the Plaintiffs' Lands and all of the fixtures upon them, including the hydroelectric fixtures and infrastructure.

- 17. On December 2, 1965, the federal government issued an Order in Council approving the expropriation of:
  - all of Lots 23, 24 and 25 of Concession 4 in the Township of Humberstone;
     and
  - part of Lot 17, the southerly part of Lot 18, and all of Lot 19, Concession 5, in the Township of Humberstone.
- 18. On December 3, 1965, Transport Canada issued Notice of Expropriation No. 153041 (the "**1965 Expropriation**") expropriating:

ALL AND SINGULAR that certain parcel or tract of land and premises (herein referred to as "the said Land"), situate and lying partly in the Township of Humberstone and partly in the City Welland, in the County of Welland, and the Province of Ontario, being composed of Lots 19... and parts of Lots 18, in Concession 5; Lots 23 and 24... Concession 4; those portions of the road allowances between the lots and concessions within the herein to be described parcel... [Emphasis added].

- 19. Three years later, on December 10, 1968, the federal government issued an Order in Council approving the expropriation of:
  - part of lots 17 and 18 and part of the road allowance between lots 16 and 17 (known as Kleinsmith Road), part of the road allowance between lots 18 and 19 (known as Horton Road); and
  - part of the road allowance between Concessions 4 and 5 (known as Forkes Road).
- 20. On December 10, 1968, the same day as the Order in Council was issued, Transport Canada issued Notice of Expropriation File No. 36-76-2-0 (the "1968 Expropriation") expropriating:

ALL AND SINGULAR that certain parcel or tract of land and premises (herein referred to as "the said Land"), situate and lying partly in the Township of Humberstone and partly in the City Welland, in the County of Welland, and the Province of Ontario, <u>being composed of Lots 19</u>... and parts of Lots 18, in Concession 5; Lots 23 and 24... Concession 4;

those portions of the road allowances between the lots and concessions within the herein to be described parcel... [Emphasis added].

- 21. The 1965 Expropriation and the 1968 Expropriation are collectively referred to herein as the "Expropriations".
- 22. The Expropriations vested ownership of the Plaintiffs' Lands in Her Majesty in the name of the Seaway.
- 23. Accordingly, as of December 10, 1968, the federal government owned the entirety of the Plaintiffs' Lands, which included all fixtures and infrastructure attached thereto.
- 24. At the time of the Expropriations, the Lot 24 Double Pole Line, the Tower Line, and the Lot 24 Single Pole Line were affixed to the Plaintiffs' Lands.
- 25. There may have been additional hydroelectric infrastructure or fixtures attached to the Plaintiffs' Lands at the time of the Expropriations. If so, the Plaintiffs will identify them prior to trial.

## (b) The Master Agreement

26. On October 6, 1969, the Seaway and the Hydro-Electric Power Commission of Ontario (the "Commission") entered into a Master Agreement regarding the permanent relocation of power lines and electricity supply facilities in the counties of Lincoln and Welland (the "Master Agreement"). This was necessitated since HONI no longer had legal title to the infrastructure and no longer had any right to undertake any activities upon the Plaintiffs' Lands.

- 27. Section 2.1 of the Master Agreement addressed the relocation and the costs thereof:
  - 2.1 The Commission shall permanently relocate and restore those power lines and electricity supply facilities as requested by the Authority [the Seaway] in writing from time to time and the entire cost of such relocation and restoration shall be paid for by the Authority [the Seaway] in the manner as hereinafter set out.
- 28. Section 4.1 of the Master Agreement grants the Commission permission to access the Seaway's lands, which includes the Plaintiffs' Lands "for the purposes of relocation and restoration of its said power lines and electricity supply facilities."
- 29. Section 5 of the Master Agreement addresses rent:
  - 5. In lieu of all rights and privileges hitherto enjoyed by the Commission within the expropriated area the Authority [the Seaway] shall grant free of rental to the Commission the right and privilege to maintain and operate its power lines and electricity supply facilities across the relocated channel and equivalent lands as more particularly set out in an agreement supplemental hereto.
- 30. There is no term set out in the Master Agreement.
- 31. The Master Agreement did not grant an easement or any interest in land, but was instead a licence between the Seaway and the Commission.

## (c) The Supplemental Agreement

32. Nearly seven years later, on June 1, 1976, the Seaway and Ontario Hydro (which is, presumably, a successor of the Commission) entered into a Supplemental Agreement, as contemplated by the Master Agreement (the "Supplemental Agreement"). In the period between the execution of the Master Agreement and the Supplemental

Agreement, there were no other legal agreements reached or executed regarding the Plaintiffs' Lands.

- 33. At s. 1 of the Supplemental Agreement, the Seaway granted Ontario Hydro the right to maintain, operate and/or renew:
  - four 230 K.V. overhead power transmission line crossings on steel towers over the Welland Canal Channel;
  - together with 115-230 K.V. lines on wooden poles on, over and/or across adjoining Welland Canal reserve land; and
  - two 27.6 K.V. cable crossings in ducts under the Welland Canal and overhead on wooden poles on, over and/or across adjoining Welland Canal reserve land easterly and westerly of the Welland Canal channel,
- 34. A significant portion of the infrastructure contemplated by the Supplemental Agreement is located on the Plaintiffs' Lands.
- 35. The Supplemental Agreement grants the above noted rights in perpetuity and free of charge.

## (d) The Feeder Line Licence

36. On April 4, 1977, the Seaway and Ontario Hydro entered into a licence for the Feeder Line (the "Feeder Line Licence"). This licence specifically permitted Ontario Hydro to:

erect, maintain, operate and/or renew a 115 k.v. electrical transmission line (hereinafter referred to as "the said line") 4,715 feet in length, more or less, on, over and/or across Welland Canal reserve land in Lots no. 17 and 18, Concession no. 5 for the former Township of Humberstone, in the county of Welland, now in the Cities of Welland and Port Colborne, in the Regional Municipality of Niagara, all in the Province of Ontario, the location of the said line being indicated coloured in red on Plan no. W.C. 77-2 hereto annexed.

- 37. A significant portion of the Feeder Line is located on the 117 Con 5 Lands.
- 38. Section 1 of the Feeder Line Licence required Ontario Hydro to pay \$75.00 annually for the licence, and s. 2 required Ontario Hydro to pay:
  - ... all rates, taxes and assessments, of whatsoever description, that may be at any time during the existence of these Presents be lawfully imposed, or become due and payable, upon, or in respect of the rights and privileges herein granted.
- 39. Neither Ontario Hydro, nor any of its successors, including HONI, have ever paid the annual rent due under the Feeder Line Licence to 117, or contributed to the payment of any taxes as they became due and payable.
- 40. Section 3 of the Feeder Line Licence required Ontario Hydro to comply with all lawful rules, regulations and by-laws of any governing body. This included environmental laws and regulations.
- 41. The term of the Feeder Line Licence was "during pleasure" and s. 10 permitted the licensor or the licensee to cancel the license forthwith upon notice to the other party. Section 11 required Ontario Hydro to forthwith remove its property after cancellation at its own expense and to restore the property to a neat and clean condition.
- 42. Section 12 of the Feeder Line Licence provides the licensor security for losses or damages in the form of a lien on Ontario Hydro's property.
- 43. Between 1977 and 2005, there were no additional licenses or changes to the legal status or ownership of the Plaintiffs' Lands, or the rights that HONI and its predecessors had with respect to the Plaintiffs' Lands.

## (e) Environmental Damage

- 44. HONI and/or its predecessors used long-lasting chemicals to deter wildlife and vegetation from encroaching upon the lines and infrastructure. HONI has admitted this repeatedly in various public disclosure documents.
- 45. A significant portion of Lots 24 and 25, Con 5 are environmentally protected provincially significant wetlands, and with almost no maintenance, the hydro corridor remains barren of vegetation and wildlife, while either side of the corridor is overrun with forest.

## (f) The First Port Colborne APS

- 46. On May 10, 2005, Canada Lands CLC Limited ("Canada Lands"), a successor to the Seaway, and The Corporation of the City of Port Colborne ("Port Colborne") entered into an Agreement of Purchase and Sale for lands that included the 117 Con 5 Lands, which included the Amalgamated Tower Line, the U Triple Line, the Feeder Line, and the Lot 19 Single Pole Line (the "First Port Colborne APS").
- 47. Section 4 of the First Port Colborne APS addressed encumbrances, and stated that the purchaser agreed to accept title subject to all registered and unregistered agreements and easements, as well as the Master Agreement, Supplemental Agreement and Feeder Line Licence.

## (g) The Second Port Colborne APS

- 48. On December 12, 2005, Canada Lands and Port Colborne entered into a second agreement of purchase and sale for lands that included the 117 Con 4 Lands and the Nyon Con 4 Lands, which included the Lot 24 Double Pole Line, the Lot 24 Single Pole Line, and the Lot 24 Tower Line (the "Second Port Colborne APS").
- 49. Section 4 of the Second Port Colborne APS addressed encumbrances, and stated that the purchaser agreed to accept title subject to all registered and unregistered agreements and easements.

## (h) The Nyon APS

- 50. On January 30, 2006, Port Colborne entered into an agreement of purchase and sale with Nyon Energy Corp. for approximately 800 acres of land on Concessions 4 and 5, in the City of Port Colborne, Regional Municipality of Niagara, which included the Plaintiffs' Lands (the "Nyon APS").
- 51. There were several onerous conditions in the Nyon APS, including an obligation for Nyon to rezone the lands, which included public consultations, and the commissioning of various reports and studies.
- 52. On May 1, 2015, after the successful rezoning of the lands, Port Colborne transferred title to the lands to several corporations, as directed by Nyon (Nyon Energy Corp. assigned the Nyon APS to Nyon). Nyon and 117 took title to the Plaintiffs' Lands, as set out at paragraph 10, above.

53. Pursuant to s. 9 of the Nyon APS the lands were transferred to Nyon on an "as-is where-is" basis.

## (i) The Assignment of any Interest of Port Colborne to Nyon and 117

- 54. On April 30, 2015, Port Colborne assigned all of its right, title and interest, both in law and equity, to and in respect of the occupancy by HONI and its predecessors of the Plaintiffs' Lands and any benefits or advantages to be derived therefrom to Nyon and 117. This included an assignment and assumption of the Master Agreement, the Supplemental Agreement and the Feeder Line Licence, and all of the rights, privileges and obligations thereunder.
- 55. On April 27, 2015, Port Colborne provided notice to HONI that it had transferred and assigned the above noted rights to the Plaintiffs and directed HONI to pay all past and future payments with respect to the aforesaid rights to the Plaintiffs, or as they may otherwise direct.

## (j) The Notice to Pay or Quit and the Notice to Remove

On September 22, 2015, the Plaintiffs delivered a Notice to Pay or Quit to HONI, care of Lou Fortini, Director Facilities and Real Estate and Gary Schneider, Vice President. In the Notice to Pay or Quit, the Plaintiffs demanded that HONI pay rent, and notified HONI that if it failed to pay the past due rent owing, as well as rent on a go-forward basis, that it would seize and sell HONI's goods and chattels located on the Plaintiffs' Lands.

- 57. On September 22, 2015, the Plaintiffs also delivered to HONI a Notice to Remove the Feeder Line.
- 58. Together with the Notice to Pay or Quit and the Notice to Remove, the Plaintiffs delivered a letter to Mr. Fortini and Mr. Schneider, wherein the Plaintiffs made it clear that the Master Agreement, the Supplemental Agreement, and the Feeder Line Licence were terminated; the Plaintiffs were the owners of the hydroelectric infrastructure; and that rent that was becoming due and owing to the Plaintiffs by HONI. With respect to rent, the Plaintiffs demanded that going forward, rent be paid in the amount of \$157,165.33 per month with interest for late payment at 19.56% per annum, and notified HONI that it considered it to currently be in the position of an overholding tenant and demanded an additional 50% in rent until HONI vacated the property, or a new licence or agreement was entered into.
- 59. On February 22, 2024, the Plaintiffs demanded that HONI begin to pay double rent as an overholding tenant, in addition to 19.56% interest on the outstanding amount due to the Plaintiffs.
- 60. To date, HONI continues to occupy the Plaintiffs' Lands and use the fixtures and infrastructure, but has not paid anything to the Plaintiffs.

# The Positions of the Plaintiffs regarding the Ownership of the Fixtures and Infrastructure, and Rent Due and Owing

## (a) Ownership of the Hydro-electric Fixtures and Infrastructure

- 61. The Plaintiffs state that the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands were expropriated and became the property of the federal government in the 1960s. Title passed from the federal government to Port Colborne and then to the Plaintiffs.
- 62. Accordingly, the Plaintiffs state that 117 is the owner of the hydroelectric fixtures and infrastructure on the 117 Con 4 Lands and the 117 Con 5 Lands, and Nyon is the owner of the hydroelectric fixtures and infrastructure on the Nyon Con 4 Lands.
- 63. In the alternative, the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands are considered unauthorized improvements to lands and have thereby become the property of the owner and have been transferred with the lands to the Plaintiffs, being the current owners.

## (b) The Current Status of the Master Agreement and the Supplemental Agreement

- 64. It was an explicit or implied term of the Master Agreement and the Supplemental Agreement that they could be terminated for any reason on no notice or, in the alternative, notice.
- 65. The Master Agreement and the Supplemental Agreement were terminated on notice on September 22, 2015, upon delivery of the Notice to Pay or Quit and

correspondence that unequivocally stated the Plaintiffs' intentions to terminate the agreements if payment was not received by September 30, 2015.

- 66. The Master Agreement and Supplemental Agreement are not permanent easements and do not create any interest in land. They are contracts/licences that are personal in nature.
- 67. There are no easements on the Plaintiffs' Lands. Since 1968, HONI has had opportunities to negotiate with the Seaway, Transport Canada and/or Canada Lands to obtain registrable, permanent easements, and has either failed to do so, or attempted to do so and was rejected.
- 68. In the alternative, if the Master Agreement and the Supplemental Agreement are not permitted to be terminated on notice, Nyon and 117 were permitted to terminate them because HONI fundamentally breached both by contaminating the Plaintiffs' Lands, without permission of the owner.
- 69. HONI contaminated the Plaintiffs' Lands and has refused or neglected to remedy the contamination. The contamination was an intentional act by HONI, for only its benefit, and has had a significant negative impact on the value of the Plaintiffs' Lands.
- 70. Accordingly, the contamination was a fundamental breach of the Master Agreement and the Supplemental Agreement that entitled Nyon and 117 to terminate them on September 22, 2015.

## (c) The Current Status of the Feeder Line Licence

- 71. Subsection 10(a) of the Feeder Line Licence permitted the licensor to cancel it forthwith at any time by notice in writing, which 117 did on September 22, 2015.
- 72. The Feeder Line Licence was terminated upon the delivery by 117 of the Notice to Remove dated September 22, 2015.
- 73. In the alternative, the Feeder Line License was terminated by 117 on September 22, 2015, which was permitted as a result of HONI fundamentally breaching the license by contaminating the Plaintiffs' Lands for the same reasons set out above regarding the termination of the Master Agreement and the Supplemental Agreement.
- 74. Section 1 of the Feeder Line Licence obligated HONI and its predecessors to pay \$75.00 annually to the licensor, and s. 2 obligated the licensee to pay "all rates, taxes and assessment, of whatsoever description, that may be at any time during the existence of these Presents be lawfully imposed, or become due and payable, upon, or in respect of the rights and privileges herein granted."
- 75. HONI, nor any of its predecessors has ever paid the rent or any of the s. 2 payments.
- 76. By failing to pay rent and the payments required under s. 2, HONI failed to fulfill its obligations under the license and deprived 117, and its predecessors in title, of the entire benefit contracted for.

77. Accordingly, in the further alternative, HONI's ongoing failure to make the payments to 117 and its predecessors under the Feeder Line Licence also constitutes a fundamental breach, which permitted 117 to terminate it on September 22, 2015.

#### **Environmental Contamination**

78. The Plaintiffs state that HONI has willfully and/or negligently contaminated the Plaintiffs' Lands through the use of long-lasting chemicals, such as arsenic trioxide, fuel oil, gasoline, PCBs, pentachlorophenol, and other substances. This contamination requires remediation.

## **Damages**

- 79. The outstanding rent due and owing by the Defendant, as of April 1, 2024, is \$56,483,814.37.1
- 80. Monthly rent continues to accrue to the Defendant as an overholding tenant at the rate of \$314,330.66, being double the monthly rent of \$157,165.33 and accruing interest at a rate of 19.56% on overdue amounts.
- 81. In accordance with s. 2 of the Feeder Line Licence, the Defendant must pay all taxes, assessments, and levies charged by any authority having jurisdiction, until the date

 $<sup>^{1}</sup>$  \$56,483,814.37 = \$358,762.45 (being \$78,582.67 with interest at 19.56% for 8 years and 6 months) + \$55,805,006.70 (being \$157,165.33 monthly rent with interest at 19.56% for 8 years and 5 months) + \$319,045.22 (being \$314,330.66 monthly rent with interest at 19.56% for 1 month)

of termination of the Feeder Line Licence, plus interest at a rate of 19.56% on overdue amounts.

- 82. The Plaintiffs are entitled to a permanent injunction requiring the Defendant to immediately cease trespassing upon the Plaintiffs' Lands for the purpose of constructing, operating, maintaining or renewing any hydroelectric fixtures or infrastructure.
- 83. The Plaintiffs are entitled to a permanent injunction requiring the Defendant to immediately cease its use of the hydroelectric fixtures and infrastructure on the Plaintiffs' Lands.
- 84. The Defendant must remediate the Plaintiffs' Lands to a pristine state, or to such state as is required by the *Environmental Protection Act*, its regulations and all other applicable environmental laws, and to pay all compensation required by law to the Plaintiffs.
- 85. The Plaintiffs are entitled to a permanent injunction requiring the Defendant to immediately cease its use of prohibited and toxic environmental contaminants on the Plaintiffs' Lands.
- 86. The Plaintiffs plead the *Trespass to Property Act*, the *Negligence Act*, the *Commercial Tenancies Act*, the *Environmental Protection Act*, the *Canadian Environmental Protection Act*, 1999, the *St. Lawrence Seaway Authority Act*, and the *Courts of Justice Act*.
- 87. The Plaintiffs propose that this action be tried in Welland.

April 9, 2024

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HYDRO ONE NETWORKS INC.

Defendant

# ONTARIO SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT WELLAND

#### STATEMENT OF CLAIM

## **MASSEY LLP**

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## **Statement of Defence**

Schedule C

# ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN

NYON OIL INC. and 1170367 ONTARIO INC.

**Plaintiffs** 

and

#### HYDRO ONE NETWORKS INC.

Defendant

#### STATEMENT OF DEFENCE

1. Except as is admitted herein, the Defendant, Hydro One Networks Inc. ("**HONI**") denies each and every allegation in the Statement of Claim.

#### Overview

- 2. In 2006, Nyon Energy Corp. purchased certain land near the Welland Canal from the City of Port Colborne for \$1 for the purpose of developing an "energy park" for the storage and transportation of petroleum products, as described in the Statement of Claim (the "Land"). The Land is now owned by the Plaintiffs Nyon Oil Inc. and 1170367 Ontario Inc. (the "Plaintiffs" or "Nyon"). Certain portions of the Provincial electricity transmission grid are located on the Land (the "Transmission Infrastructure") and are owned and operated by HONI.
- 3. In 2015, Nyon sent a letter to HONI claiming ownership of the Transmission Infrastructure and purporting to terminate certain agreements that permit the operation and maintenance of the Transmission Infrastructure on the Land. That letter was held in abeyance by the parties while they attempted to determine a method for resolving their disputes. HONI's counsel wrote to Nyon in December 2015 with a without prejudice proposal. Nyon did not substantively respond until February 22, 2024, when it delivered a letter to HONI enclosing a Notice of Action.

- 4. The Statement of Claim in this action was served by Nyon on April 9. In this action, Nyon seeks more than \$55M in damages for "rent", advances claims of ownership of the Transmission Infrastructure, and makes allegations based on unspecific environmental contamination on the Land.
- 5. On April 17, 2024, HONI advised Nyon of its intention to bring an expropriation application before the Ontario Energy Board to expropriate land rights sufficient to operate and maintain the Transmission Infrastructure on the Land in light of the relief requested in Nyon's Statement of Claim, including Nyon's request for a permanent injunction to shut down a portion of the Provincial electricity transmission grid. The Ontario Energy Board has exclusive jurisdiction to consider and decide such an application in the public interest.
- 6. HONI requested that Nyon consent to a temporary stay of this action while the expropriation application is decided. If successful, the expropriation application will moot many, if not all, of Nyon's claims. This action should be stayed while the Ontario Energy Board exercises its exclusive jurisdiction.
- 7. Nyon refused to consent to a temporary stay and threatened to note HONI in default if HONI did not file a Statement of Defence, despite HONI's stated intention to move for a stay.
- 8. HONI files this defence to respond in summary fashion to the allegations in the Statement of Claim and to avoid a precipitous noting in default. In the event that this action proceeds, HONI intends to amend its Statement of Defence to more particularly respond to the allegations in the Statement of Claim.

#### The Parties

- 9. The Plaintiffs are corporations incorporated pursuant to the laws of Ontario. The Plaintiffs purport to own the Land.
- 10. Details of the relationship between Nyon and 117 Ontario are within the knowledge of the Plaintiffs, or either of them, but are unknown to HONI.

- 11. HONI is a company incorporated pursuant to the laws of Ontario. HONI's principal business is the transmission and distribution of electricity to customers in Ontario. HONI owns, maintains and operates electricity transmission and distribution infrastructure throughout Ontario, including certain infrastructure on Land owned by the Plaintiff(s). Throughout this Statement of Defence, HONI refers to the entity "Hydro One Networks Inc." as well as all predecessor corporations.
- 12. HONI is principally regulated by the Ontario Energy Board, which has exclusive jurisdiction in respect of all matters in which jurisdiction is conferred on it by the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, or otherwise.

## The Transmission Infrastructure Was Not Expropriated by the Seaway Authority

- 13. HONI has owned and operated a transmission system on the Land since about 1930. Originally HONI was the beneficiary of easements permitting the operation and maintenance of the transmission system.
- 14. In the 1960s, the St. Lawrence Seaway Authority (the "Seaway Authority") expropriated certain lands in the area of the Welland Canal as part of a re-alignment expansion project.
- 15. HONI's original transmission line had to be relocated to accommodate the expansion. The Seaway Authority and HONI entered into an October 1969 agreement (the "Master Agreement") and a June 1976 Supplemental Agreement (the "Supplemental Agreement") in order to facilitate that relocation.
- 16. Pursuant to those agreements, at the Seaway Authority's request, HONI removed existing transmission infrastructure and constructed new transmission infrastructure in a new location.
- 17. The intention of the parties was to accommodate the Seaway Authority's Canal project of relocating its channel between Port Robinson and Port Colborne while allowing HONI's rights to operate a transmission line for the public benefit to continue in perpetuity.

18. The Seaway Authority did not intend to, and in fact did not, expropriate the Transmission Infrastructure.

## The Master Agreement Confirms that HONI Owns the Transmission Infrastructure

- 19. Contrary to the allegation at paragraph 26 of the Statement of Claim, nothing in the Master Agreement provides that HONI no longer had title to the Transmission Infrastructure. Rather, the Master Agreement confirmed that "the power lines and electrical supply facilities" continued to be owned by HONI. For example, Section 1.1 provides that HONI would be required to prepare an estimate of the cost of relocating "its" power lines and electrical supply facilities.
- 20. Section 2.4 provides that in the event that HONI's power lines and electrical supply facilities were relocated, HONI was only responsible for paying the cost of betterments or improvements to "its" power lines or electrical supply facilities.
- 21. Section 5, confirms that HONI has the right to operate "its" power lines and electricity facilities rent free and in perpetuity:

In lieu of all rights and privileges hitherto enjoyed by the Commission within the expropriated area the Authority shall grant free of rental to [HONI] the right and privilege to maintain and operate its power lines and electricity supply facilities across the relocated channel and equivalent lands more particularly set out in an agreement supplemental hereto.

[Emphasis added.]

- 22. Schedule "A" to the Master Agreement similarly grants HONI the "right and privilege to erect, maintain, operate and/or renew" certain specified power transmission lines and/or electricity supply facilities.
- 23. Since the signing of the Master Agreement, HONI and its predecessors have undertaken erection, maintenance, operation and renewal of the Transmission Infrastructure in accordance with the rights granted under the Master Agreement.

## **Subsequent Agreements Confirm that HONI Owns the Transmission Infrastructure**

- 24. On June 1, 1976, the Seaway Authority entered into the Supplemental Agreement, to permit HONI to "maintain, operate and/or renew" certain Transmission Infrastructure.
- 25. The Supplemental Agreement confirms that the Transmission Infrastructure was understood by the parties, and was in fact, the property of HONI:

... in lieu of all rights and privileges hereto enjoyed by [HONI] within the expropriated area the Authority did agree to grant free of rental to HONI the right and privilege to maintain and operate <u>its existing power transmission lines and electricity supply facilities</u>...

[Emphasis added.]

- 26. As admitted by the Plaintiffs at paragraph 35 of the Statement of Claim, the Supplemental Agreement granted the right to maintain, operate and/or renew the Transmission Infrastructure in perpetuity and free of charge.
- 27. On April 4, 1977, the Seaway Authority and HONI entered into a licence agreement to permit HONI to "erect, maintain, operate and / or renew" certain Transmission Infrastructure (the "April 1977 Licence Agreement").
- 28. Section 7 of the April 1977 Licence Agreement provides that all "buildings, structures, materials, supplies, effects, and things... constructed, erected, brought, placed or made upon the lands and premises of the Licensor" were the property of HONI.
- 29. At all times, HONI has complied with the April 1977 Licence Agreement.
- 30. On November 17, 2005, Her Majesty the Queen in the Right of Canada represented by the Minister of Transport and HONI entered into a Supplemental Licence Agreement, which granted HONI continued permission to "erect, maintain, operate and/or renew" certain Transmission Infrastructure (the "November 2005 Licence Agreement", together with the April 1977 Licence Agreement, the "Licence Agreements").
- 31. At all times, HONI has complied with the November 2005 Licence Agreement.

## Nyon Did Not Acquire the Transmission Infrastructure

- On May 10, 2005, the Canada Lands Company CLC Limited (the "Canada Lands Company") sold a portion of the Land to the Corporation of the City of Port Colborne (the "City of Port Colborne") pursuant to an agreement of purchase and sale (the "May 2005 APS").
- 33. Section 4 of the May 2005 APS provides that the City of Port Colborne agreed to accept title subject to, among other things, all registered or unregistered agreement with municipalities and publicly or privately regulated utilities. This included all agreements with HONI.
- 34. Section 6 of the May 2005 APS provides that the purchaser and vender agree that "no fixtures, building, or chattels are included in the Purchase Price." The Transmission Infrastructure, which was and still is owned by HONI, was not subject to the APS.
- 35. Schedule "C" to the May 2005 APS provided that the Master Services Agreement and the 1977 License were permitted encumbrances.
- 36. On December 13, 2005, the Canada Lands Company sold another portion of the Land to the City of Port Colborne pursuant to an agreement of purchase and sale (the "December 2005 APS").
- 37. Section 4 of the December 2005 APS provides that the City of Port Colborne agreed to accept title subject to, among other things, all registered or unregistered agreement with municipalities and publicly or privately regulated utilities. This included all agreements with HONI.
- 38. Section 6 of the December 2005 APS provides that the purchaser and vender agree that "no fixtures, building, or chattels are included in the Purchase Price." The Transmission Infrastructure, which was and still is owned by HONI, was not subject to the APS.
- 39. The City of Port Colborn did not acquire title to any of Transmission Infrastructure pursuant to the May 2005 APS or the December 2005 APS.

40. On January 27, 2006, the City of Port Colborn and Nyon Energy Corp. entered into an Agreement of Purchase and Sale for the sale of certain lands to Nyon. At that time, the City of Port Colborn did not own any of the Transmission Infrastructure and could not sell any of the Transmission Infrastructure to Nyon.

# Nyon's Purported Terminations of the Master Agreement, Supplemental Agreement, and Licences are Ineffective

- 41. Contrary to the allegation at paragraph 64 of the Statement of Claim, it was not an explicit or implied term of the Master Agreement or the Supplemental Agreement that they could be terminated for any reason on no notice, or in the alternative, on notice. The terms and purpose of both agreements indicate that they were intended to be, and are, agreements that cannot be terminated. Nyon's purported terminations of the Master Agreement and Supplemental Agreement are of no force or effect.
- 42. Nyon is not permitted to cancel or terminate the Licence Agreements.

## No Rent Arrears or Obligation to Pay Rent

- 43. On September 22, 2015, Nyon wrote letters to HONI claiming ownership of the Transmission Infrastructure, purporting to terminate certain agreements, and enclosing certain notices.
- 44. On October 2, 2015, counsel for HONI and counsel for Nyon agreed to hold Nyon's letters of September 22, 2015 "in abeyance" pending efforts to resolve the disputes or agree on a process for resolving the disputes.
- 45. Further correspondence was exchanged between counsel for HONI and counsel for Nyon in October, November, and December 2015.
- 46. On December 9, 2015, HONI's counsel wrote a without prejudice letter to Nyon's counsel. Neither Nyon nor their counsel responded in any way until December 2023, and did not respond substantively until February 22, 2024 when Nyon's new counsel wrote and demanded payment of over \$55 million for past rent.

- 47. HONI denies that the Master Agreement, Supplemental Agreement, or Licence Agreements were validly terminated at any time. In the alternative, any purported termination by Nyon was held in abeyance until February 22, 2024.
- 48. Contrary to paragraphs 1(a), 56, 76, and 79 of the Statement of Claim, HONI denies that there are any amounts owing for rent under any agreement or at common law.
- 49. Contrary to paragraphs 59 and 80 of the Statement of Claim, HONI is not an overholding tenant pursuant to the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, and there exist no other circumstances that would justify the Plaintiffs' imposition of double rent.

#### **No Liability for Environmental Contamination**

- 50. The Plaintiffs have set out no material facts to substantiate their bald assertion that there was any contamination on the Land at issue or on adjacent lands. The Plaintiffs have provided no particulars for HONI's alleged conduct giving rise to such contamination, which is denied. Such particulars are within the knowledge of the Plaintiffs.
- 51. In any event, HONI denies that the Plaintiffs have a statutory cause of action under the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended.
- 52. HONI denies that it is liable to compensate the Plaintiffs for environmental contamination, which contamination is denied, to conduct any environmental assessments or studies, or to remediate the Land at issue in the manner described in the Statement of Claim or in any other manner.
- 53. Furthermore, HONI denies that it breached the Master Agreement and the Supplemental Agreement in the manner described in paragraph 70 of the Statement of Claim, or in any other manner whatsoever.

## **Damages and Mitigation**

54. HONI denies that the Plaintiffs suffered any damages or loss, consequential or otherwise, for which they would be entitled to compensation. HONI denies the amounts

claimed in paragraphs 1(a) and 1(b) of the Statement of Claim and puts the Plaintiffs to strict proof thereof.

- 55. HONI denies that any actionable act or omission on its part caused or contributed to any damages suffered by the Plaintiffs, which are denied.
- 56. Furthermore, the amounts claimed by the Plaintiffs in the Statement of Claim are excessive, too remote, not recoverable in law, and not legally compensable.
- 57. To the extent that the Plaintiffs suffered any damages as a result of HONI's conduct, which is denied, the Plaintiffs failed to make commercially reasonable efforts to mitigate their damages.

#### **No Declarations**

- 58. HONI denies that the Plaintiffs have any entitlement to the declarations sought in paragraph 1 of the Statement of Claim.
- 59. The Plaintiffs are not the owners of the Transmission Infrastructure on the Land at issue. Rather, HONI is the owner of all Transmission Infrastructure.
- 60. The Transmission Infrastructure was not expropriated by the Seaway Authority.
- 61. The Transmission Infrastructure was erected after the Land was expropriated by the Seaway Authority.
- 62. Under section 44 of the *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A, and at common law, if property of an electricity transmitter is affixed to realty, the property remains subject to the rights of the transmitter and does not become part of the realty.
- 63. HONI denies that its use, maintenance and operation of the Transmission Infrastructure constitutes a trespass. In the alternative, HONI pleads that it reasonably believed it had an interest that entitled it to do the act(s) complained of.
- 64. In the event that Nyon is the owner of the Transmission Infrastructure, which is not admitted but is denied, it is a transmitter under the *Ontario Energy Board Act* and the

Electricity Act, 1998. Nyon will be required to be a licenced transmitter and will be responsible for operating and maintaining the Transmission Infrastructure in accordance with the provisions of those acts and all other applicable legislation or regulations, including the Ontario Energy Board's Transmission System Code.

65. In the event that Nyon is the owner of the Transmission Infrastructure, which is not admitted but is denied, Nyon will be required to become a licenced transmitter.

#### **No Injunctions**

- 66. The Plaintiffs have set out no material facts and provided no particulars to substantiate their bald assertion that they are entitled to various permanent injunctions in respect of HONI's use of the infrastructure or any of HONI's other conduct.
- 67. In any event, HONI denies that the Plaintiffs have any entitlement to the injunctions sought in paragraph 1 of the Statement of Claim, whether permanent or temporary.

#### **Nyon's Claims are Statute Barred**

68. Nyon's claims are statute barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B section 4, or the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, section 17. In the alternative, Nyon's claims are barred by the doctrine of laches.

#### Conclusion

- 69. HONI denies that the Plaintiffs are entitled to pre- and post-judgment interest at the excessive rates claimed in paragraphs 1(p) and 1(q) of the Statement of Claim.
- 70. HONI pleads and relies on the provisions of the *Commercial Tenancies Act*; the *Real Property Limitations Act*; the *Limitations Act*, 2002; the *Environmental Protection Act*, as amended; the *Ontario Energy Board Act*, 1998; the *Electricity Act*; the *Trespass to Property Act*, R.S.O. 1990, c. T.21; and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

71. HONI asks that this action be dismissed with its costs paid on a substantial indemnity basis.

May 17, 2024

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# ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding commenced at WELLAND

## STATEMENT OF DEFENCE

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