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MASSEYLLP

February 13, 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

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Mr. Rogers sent you a letter on February 12, 2025, that asserts a provision of the *Power Commission Act*, R.S.O. 1960, c. 300, saved the transmission infrastructure that was on the property when it was expropriated by the St. Lawrence Seaway Authority (the **"Seaway"**). He is wrong. We have had this discussion with him on several occasions. The lands were expropriated in 1965 and 1968 pursuant to the *St. Lawrence Seaway Act,* R.S.C. 1952, c. 242 (the **"SLSA"**). The SLSA is federal legislation. The *Power Commission Act* and the *Electricity Act, 1998* are both provincial statutes. Additionally, s. 108 of the *Constitution Act, 1867* grants property rights related to canals to the federal government. Where there is a conflict between federal and provincial legislation, the constitutional principle of paramountcy requires the federal legislation to prevail over the provincial legislation. There is a clear conflict between the two statutes – the SLSA provided for the expropriation of the entirety of the lands and fixtures, without exception, and the *Power Commission Act* attempted to maintain a property right in specific fixtures in favour of Hydro One (then the Hydro-Electric Power Commission of Ontario). Since there was no exception for the transmission infrastructure, the expropriation transferred that infrastructure to the Seaway. There is no other conclusion. Not only is the conflict between the two statutes readily apparent, but it continues to form the heart of the dispute between the parties today.

In its letter, Hydro One asserts that there was previously a licence between the Seaway and the Hydro-Electric Power Commission of Ontario (the **"Commission"**), whereby the transmission infrastructure is referred to using the word "its" in the possessive tense referring to the Commission. He asserts that this use of the word "its" in a 1970s licence is conclusive evidence of the parties' intentions that the transmission infrastructure was to be owned by the Commission. That argument is incredibly weak. There are many more persuasive arguments that the Seaway intended to own all of the land and

fixtures that it expropriated, which include but are not limited to: (i) the plain reading of the legislation that has no exceptions; (ii) the plain reading of the federal Orders in Council that authorized the expropriations without exceptions; (iii) the licence that Mr. Rogers refers to was only a rental licence that did not bind successors and assigns; (iv) the expansion of the Welland Canal through the lands and the Seaway's taking of all other fixtures in its way; and (v) the licence that the Seaway entered into with the Commission did not acknowledge any ownership of property or land rights (presumably because the Seaway only recently completed an expansive expropriation to complete the project and was not interested in muddying those expropriations by returning any land or property rights that it was not obligated to). This is the tip of the iceberg. We look forward to meeting Hydro One's "its" argument in court.

Then Hydro One asserts that our clients have not taken any action consistent with their ownership of the transmission infrastructure since 2015. That is wrong again. In 2013 and 2015, our clients, directly, put Hydro One on notice that Hydro One owed our clients rent for its continued use of our clients' infrastructure and the occupation of our clients' lands. There was some correspondence between Hydro One's counsel and my clients' past counsel in September and October 2015, but this issue was never resolved. Hydro One did nothing about the clear issue they were faced with regarding the ownership of the infrastructure and essentially acquiesced for nearly 10 years now to our clients' position. It did nothing to protect its ostensible property rights – it did not engage our clients; it did not bring an Application to the Superior Court of Justice; and did not apply to the Ontario Energy Board to determine the matter. Now, it has come time for Hydro to pay for its use of the lands and infrastructure and it is making a last-ditch attempt to avoid those obligations. It will not work. If Hydro One truly understood itself to own the infrastructure, it would have done something to defeat our clients' position when our clients alerted them to these issues in 2013 and again in 2015. The true owner of property that another has asserted title to does not do nothing to protect its right to that property; however, that is exactly what Hydro One did – nothing.

Then Hydro One argues that an adjournment of the expropriation application *sine die* is inappropriate because our clients' claim with respect to their ownership of the transmission infrastructure is "weak". Notably, HONI offers no evidentiary basis to the Board for this assertion other than its own argument. As is evident from this letter and our February 5, 2025 letter, this argument is not "weak". This is a unique situation with respect to the transmission infrastructure, but our clients' ownership of it and the chain of title is clear. The best argument Mr. Rogers can muster is the use of the word "its" in a 1970s licence. If Hydro One truly believed that our clients' claims of ownership of the transmission infrastructure was weak and unlikely to be successful, it would have brought a motion to strike that portion of the claim long ago. It has not done that. Until Hydro One's letter to you, Madam Registrar, it has not even suggested that our clients' position regarding the ownership of the infrastructure is weak. This is the first we have heard of that position.

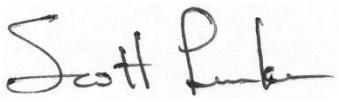
With respect to the allegation of 'self-help', our clients are entitled to demand that Hydro One comply with their obligations set out in the *Electricity Act, 1998* with respect to accessing a private landowner's property – specifically s. 40(8) which strictly requires notice. Hydro One has never once provided our clients the notice that they are obligated by law to provide. Moreover, in the action issued by our clients, Hydro One refused to participate in the process for many

months – it took them more than a year after being notified of our clients' positions for them to produce their documentary productions. After repeatedly thumbing its nose to its statute-imposed obligations regarding notice to our clients, and refusing to participate in the civil litigation process for nearly a year, our clients instructed us to deliver Hydro One a Notice of Trespass and to book a case conference. Once we did that, Hydro One finally took action. Our clients have not enforced the Notice of Trespass, and so long as Hydro One is participating in the litigation process, they do not intend to (Hydro one still fails to provide our clients notice when they enter upon the lands). It is unfortunate that we had to issue a Notice of Trespass and book a case conference to convince Hydro One to comply with its obligations under the *Rules of Civil Procedure*.

Finally, in its letter, Hydro One attempts to persuade you that the OEB has jurisdiction to determine who owns the transmission infrastructure on our clients' property. Notwithstanding that Mr. Rogers has refused to provide us with a copy of his client's application, we understand from him that Hydro One's application does not include a request to expropriate the transmission infrastructure should the OEB determine that our clients own it. It is unclear why he attempts to persuade you that the OEB has the jurisdiction to determine the infrastructure ownership issue, but has not included a request to expropriate it should the OEB determine our clients own it.

In summary, our clients own the infrastructure. The history, chain of title, and law make that clear. Our clients do not dispute the OEB's authority to make an order authorizing Hydro One to expropriate land for a "work" when it intends to construct, expand or reinforce an electricity transmission line; however, if Hydro One continues to protest our clients' ownership of the transmission infrastructure, that issue will have to be determined prior to any expropriation so that it is clear exactly what Hydro One is expropriating. The infrastructure ownership issue requires an examination of affidavit and documentary evidence regarding the historical expropriations by the Seaway and the chain of title resulting therefrom, and an analysis of constitutional law principles by a judge of the Superior Court of Justice. There is no clear jurisdiction for the OEB to determine the application of historical federal expropriation legislation and the conflicts of law resulting therefrom. That jurisdiction cannot be inferred by a loose reading of a couple sections of the *Ontario Energy Board Act*, as Mr. Rogers suggests.

Yours very truly,
MASSEY LLP



Scott Lemke
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