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Via RESS and Email

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Nancy Marconi, Registrar

Re: Enbridge Gas Inc. EB-2024-0111 - 2024 Rebasing and IRM: Submissions of Ginoogaming First Nation

Dear: Nancy Marconi:

I. INTRODUCTION

1. We are counsel to Ginoogaming First Nation ("**GFN**") in the matter of the application of Enbridge Gas Inc. ("**EGI**") to the Ontario Energy Board ("**OEB**") approving or fixing just and reasonable rates for the sale, distribution, transmission, and storage of gas commencing January 1, 2024 (the "**Application**").
2. GFN is an Indigenous People, a customer of EGI, a participant the Indigenous Working Group that operates with EGI, and on the front lines of efforts and struggles to break through the walls created by the patterns of systemic harm described further below.
3. The Supreme Court of Canada has repeatedly implored that the Constitution to which all of us must adhere, includes the key purpose of reconciliation of the Crown and settlers with Indigenous Peoples.¹ If this admonition is nothing but words that float away in the wind, if "reconciliation" is nothing but political and economic puffery, we are failing a constitutional mandate.

¹ *R. v Van der Peet*, [1996] 2 SCR 507 at para 31: "[T]he aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."; see also *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida Nation*") at paras 17, 20 and 32.; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24; and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

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4. Reconciliation demands action, and that action must take us beyond the entrenched pattern of doing the bare minimum for Indigenous Peoples.²
5. Relegating First Nations to below-poverty-line conditions, worse education and healthcare and housing services than any other identified populations in Canada, and footnotes in the economy continues a pattern of systemic harm that has been described over and over as cultural genocide.³
6. GFN supports and endorses the submissions of Minogi and Three Fires Group, but goes further in this regard:
 - (a) EGI's Lower-Carbon Energy Program with its related Indigenous Participation Framework Proposal (collectively the "**RNG Proposal and Indigenous Framework**"), is a positive step in support of the long-term viability and sustainability of Ontario's energy sector in a way that also supports the objectives of economic reconciliation, but GFN submits *it should go even farther in its target and discount percentages* – it is still within the realm of the bare minimum; and
 - (b) Specifically, the "25% Indigenous ownership" standard for "qualifying Indigenous owned businesses" should be on a sliding scale of increased bid points for increased Indigenous ownership up to 100%. Additionally, the "5% Indigenous Target" that will trigger the end of the Indigenous Discount Advantage incentive program is not high enough to break the pattern above.

II. INDIGENOUS FRAMEWORK

7. The Indigenous Framework proposal was set out at Exhibit K2.5. It provides:

² *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, at para 66: "The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty." And para 73: "The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras 16 and 18. It is not a cause of action itself, rather, it speaks to *how* obligations that attract it must be fulfilled..."

³ Canada, The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the final report of the Truth and Reconciliation Commission of Canada* at pp. 2, 3, 55, 133; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> at pp. 52 – 54, 167-69, 174.; Kimberly Matheson *et al.*, "Canada's Colonial Genocide of Indigenous Peoples: A Review of the Psychosocial and Neurobiological Processes Linking Trauma and Intergenerational Outcomes" (2022), 19, 6455, *Int J Environ Res Public Health*; see also House of Commons, Standing Committee on Indigenous and Northern Affairs, *Barriers to Economic Development in Indigenous Communities*, online: <<https://www.ourcommons.ca/Content/Committee/441/INAN/Reports/RP11714230/inanrp02/inanrp02-e.pdf>>. (Setting out barriers to economic development that exist in Indigenous communities and conditions that prevent better socioeconomic outcomes. These barriers include the legacy of colonialisms, the failure to recognize jurisdiction, inadequate infrastructure and others.)

In the event the OEB substantially approves EGI's proposed Lower-Carbon Voluntary Program, EGI will apply the following framework to its procurement of RNG and its evaluation of RNG bids under the approved program (which would include both voluntary participation by large volume customers and procurement on behalf of all system gas customers):

EGI will provide all bids from qualifying Indigenous-owned businesses located in Ontario ("Indigenous Bids") with a 10% discount advantage to incent support for Indigenous participation (the "Indigenous Discount Advantage"). For clarity, "qualifying Indigenous owned businesses" shall mean any corporation, partnership, JV, etc, that includes Indigenous ownership or equivalent participation of 25% or more that is put forward to EGI by Indigenous communities in Ontario via a Business Information Sheet or official correspondence. EGI will factor the Indigenous Discount Advantage into the evaluation of bids for the procurement of RNG by implying a 10% discount to the bid price received from Indigenous Bids.

The Indigenous Discount Advantage shall apply to the consideration of all Indigenous Bids until the earliest of the two following events:

- (a) Upon reaching 5% of the total amount of RNG procured under the approved program from Indigenous-owned businesses (the "5% Indigenous Target"); or*
- (b) The end of the approved program term. EGI will report on the status of its progress towards the 5% Indigenous Target as part of the annual gas supply plan update process (including information with respect to any price paid for Indigenous Bids for RNG).*

In addition, in EGI's evaluation of the lowest reasonable price, EGI will consider the 5% Indigenous Target amongst other applicable factors, which may include consideration of the past performance of bidders. EGI's agreement to the Indigenous Discount Advantage is contingent on associated costs being considered part of the overall RNG costs of the approved program such that these costs would be recoverable from program participants, which include both voluntary participants and all system gas customers.

8. GFN submits that this is on the right track but should go even farther in its target and discount percentages.
9. The measure of meaningful reconciliation is derived **not** by comparing what we do now to what was done in the past (which has been defined as above). Rather it is comparing what we do now to what we can and should do to move beyond the unjust past (and present). Reconciliation is a principle akin to equality, a foundation around which enlightened societies are to govern and behave.⁴ If we do not get this right, there is little hope for any other advancement.

⁴ Naomi Metallic, "Aboriginal Rights, Legislative Reconciliation and Constitutionalism, Schulich Law Scholars" (2022-23) 27:1 Rev Const Stud 1, pp. 36.; *First Nations Child and Family Caring Society of Canada v Minister of Indian and Northern Affairs (AG)*, 2016 CHRT 2 at para 319-328.; Government of Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, (2021), online: <<https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>>.

10. Foundational constitutional principles are expected to be followed. We ascertain if they are being followed by examining *effects or efforts* and not wishes (or intentions), and by demanding *best* efforts and not just bare efforts. For instance, the test for equality under section 15 of the Charter is whether the impugned action has the effect (regardless of the intent) of discriminating⁵, and such action is only justified by meeting stringent criteria (the “*Oakes*” test) including pressing and substantial purpose, and minimal impairment to equality.⁶ Likewise, under section 35 of the Constitution, an infringement of an inherent/aboriginal or treaty right is only justified if it meets similar criteria.⁷
11. What this speaks to here, is not that GFN is asserting an Indigenous right to have a certain percentage of business procurement or economic barrier-lowering, but instead how the OEB can and should assess the merits of the Indigenous Framework as proposed by EGI, and the GFN improvements to it proposed here.
12. The 25% Indigenous Ownership floor to qualify for the 10% Indigenous Discount Advantage is indeed a positive step. The issue here is that the entrenched pattern in Canada of ignoring and marginalizing Indigenous Nations *is an entrenched pattern*.⁸ Attitudes and behaviours are deep and hard to shift and colour what people think and do. In such a situation, a floor or minimum is often treated as a ceiling. As a result, GFN submits that a sliding scale of increased advantage for increased Indigenous participation is more appropriate. For instance, if a minimum 25% Indigenous ownership derives a 10% Discount Advantage, for every 5% increase beyond that, an additional 0.5% discount advantage should be applied.
13. There are a number of examples of this kind of sliding scale to effect economic reconciliation for Indigenous Peoples in Canada:
 - (a) IESO LT-1 RFP and LT-2 draft RFP rules incentivizing Indigenous participation and project siting on Indigenous Lands by awarding higher points to proponents based on the level of Indigenous community participation, with the highest score (3 points) granted to proposals where Indigenous participation met or exceeded 50%;
 - (b) Ontario’s FIT contracts bid rules incentivizing up to 50% Indigenous ownership by increasing contract price on a sliding scale through the “Aboriginal Price Adder;”
 - (c) Ontario’s Ministry of Finance Aboriginal Loan Guarantee Program designed to help Indigenous peoples finance their equity buy-in to increase Indigenous ownership;
 - (d) The East West Tie and Waasigan Transmission Projects where First Nation limited partnerships had 30% and 50% ownership with the proponent respectively and

⁵ *R. v. Kapp*, 2008 SCC 41 at para 17.; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras 39 & 40.

⁶ *R. v Oakes*, [1986] 1 SCR 103.

⁷ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at paras 13, 77, 78-80.; *R. v Sparrow*, [1990] 1 SCR 1075.

⁸ Canadian Human Rights Commission, *Discussion Paper on Systemic Racism*, online: <https://www.chrc-ccdp.gc.ca/sites/default/files/2023-10/discussion_paper_on_systemic_racism.pdf>, at pp. 1: “Systemic racism is deeply entrenched in Canadian society”.

where procurement for business contracts included higher weighting for greater levels of Indigenous participation;

- (e) BC Hydro's recent clean energy procurement process, which includes a 25% First Nations ownership requirement;
 - (f) Hydro One's Durham Kawartha Power Line;
 - (g) Watay line with participating First Nations indirectly holding a 51% interest;⁹
 - (h) Hydro One's Chatham-Kent to Lakeshore Transmission Line Project, which offered five First Nations the opportunity to invest in a 50% equity stake in the transmission line component and established a 50-50 equity sharing precedent with participating First Nations to the build-out of planned and future projects in this area;
 - (i) Hydro One Wawa-Porcupine transmission line project provides proximate First Nations the opportunity to invest in a 50 per cent equity stake in the transmission line component of the project through Hydro One's 50-50 equity partnership model; and
 - (j) Minister Lecce announcing exploring new nuclear generation in Port Hope to include an opportunity for Indigenous equity participation in any generation project and in procurement processes.¹⁰
14. Yet here, the EGI proposal would fall short. GFN submits that the EGI can be improved by incorporating a sliding scale into the Indigenous Discount Advantage incentive program for "qualifying Indigenous owned businesses" that exceed the 25% Indigenous Ownership floor.
15. In respect of the 5% Indigenous Target, it is indeed an improvement from the past and today at 0%. But again, this is not the correct comparator. This Target is weak in comparison to what can be done and is being done in many other cases in Canada.
16. It is weak in the following ways:
- (a) It is a target and not a hard requirement;
 - (b) There are no consequences or penalties to EGI for failing to meet the Target and thus it is not incentivized enough to do so; and
 - (c) The 5% is too low.
17. It is common knowledge that the standard today in accommodation or impact benefit agreements between First Nations and proponents is to provide a minimum percentage of

⁹ Ontario Energy Board, "Decision and Order EB-2018-0190" (Revised April 29, 2019), DOI: <<https://www.rds.oeb.ca/CMWebDrawer/Record/640395/File/document>>.

¹⁰ Ontario, *Ontario Exploring New Nuclear Energy Generation in Port Hope*, (15 January 2025), Online: <<https://news.ontario.ca/en/release/1005585/ontario-exploring-new-nuclear-energy-generation-in-port-hope>>.

the gross value total of all expected contracts, as set asides to First Nation businesses (those that somehow benefit the First Nation, and including joint ventures with other companies). Set asides mean that the company will negotiate a contract only with the First Nation business based on certain clear criteria in the accommodation agreement and based on transparent disclosure of all costs and profit margins. This ensures that set asides are close to being guaranteed to be awarded to the First Nation business. This is much more than a target; it is a hard expectation.^{11 12}

18. In accommodation or impact benefit agreements, the contracts that are not designated as set aside for a First Nation affected by the project, can be subject to tender. But in that event, *all* tender processes provide for priority or preference to bidders that have a high degree of Indigenous participation, as set out in the bidders' Indigenous participation plans. That is, no contract should be awarded to any bidder unless that bidder has a strong Indigenous participation component, which includes ownership, sub-contracting, and employment and training priority to the First Nation. The "incentive" here is that the First Nation can dispute the award of a contract if concerned it did not provide such priority, because the obligation to do so is a hard requirement that applies across the board.
19. Where there are targets for percentage of contracts to be awarded to Indigenous businesses, many agreements set such targets at 20% or higher. The following are some publicly-available examples:
 - (a) Waasigan Transmission line project agreement between HONI and participating First Nations;¹³

¹¹ See Ontario Energy Board, "Decision and Order EB-2017-0182 | EB-2017-0194 | EB-2017-0364", (April 16, 2024) DOI: <<https://www.rds.oeb.ca/CMWebDrawer/Record/634097/File/document>>, at pp. 54-55, where the OEB noted that: "NextBridge and [Bamkushwada Limited Partnership] have entered into an economic partnership agreement that provides BLP with a 20% equity interest in NextBridge's proposed project ... In addition, Hydro One states that it is committed to offering 34% equity ownership in its proposed project to BLP." See also NextEra Energy, "[Transmission line continues to empower Indigenous communities and enhance electricity reliability in Ontario](#)", (15 September 2023), where during construction, "Supercom Industries LP, a 100% Indigenous-owned partnership overseeing hiring and procurement, formed around the East-West Tie transmission project... ensured that Indigenous workers constituted [60%] the peak project workforce."

¹² See Hydro One Networks Inc, "Argument-in-Chief EB-2023-0198", (February 13, 2024) DOI: <<https://www.rds.oeb.ca/CMWebDrawer/Record/838582/File/document>>, at p. 30: "To advance action on reconciliation and to ensure the timely completion of the Project to meet Provincial energy needs, the Project is being constructed in partnership with nine First Nations in the region, who are actively involved in project development and construction, and will have the opportunity to invest in 50 per cent of the equity stake in the transmission line component of the Project. Through an industry-leading partnership approach, the Project will advance Provincial energy needs while providing innovative and lasting benefits to Indigenous communities in procurement, employment, economic benefits and investment opportunities.

¹³ Ontario Energy Board, "Decision and Order EB-2023-0198", DOI: <<https://www.rds.oeb.ca/CMWebDrawer/Record/849130/File/document>> at p. 20, where the OEB noted that: "the transmission line facilities comprising the Project will become owned by a future limited partnership that will offer a 50% equity stake to nine First Nation partners."

- (b) Enbridge Indigenous Reconciliation Action Plan (e.g. Line 3 replacement project),¹⁴
- (c) Musselwhite Mine in Ontario (smaller project but it had a target of 30% employment of Windigo and Shibogama First Nation Councils;¹⁵
- (d) Federal departments and agencies have a target to meet or exceed a minimum 5% for the total value of contracts to be held by Indigenous businesses;¹⁶
- (e) OPG's announced refurbishment of Pickering nuclear generating station includes OPG commitment to spend \$100 million with Indigenous companies over the life of the refurbishment project, including contracting, employment and other economic benefits related to the project; and¹⁷
- (f) Watay Power Transmission project had approximately 20% of workers from First Nation communities.¹⁸

20. Here too, the EGI proposal falls short. GFN submits that the EGI can be improved by raising the 5% Indigenous Target substantially, to at least 20%.

III. CONCLUSION

21. Clearly, in assessing the EGI proposed Indigenous Framework, there are many examples of "what can and should be done." Though it is a step in the right direction, as currently constituted, the EGI proposal falls short. GFN submits that the EGI can and should be improved upon as indicated herein.

Yours sincerely,

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¹⁴ Enbridge, *A billion-dollar commitment: Target set for Indigenous business spending* (January 2023), Online <<https://www.enbridge.com/projects-and-infrastructure/public-awareness/indigenous/indigenous-business-spending-target>>.

¹⁵ Canada, Natural Resources Canada, *Musselwhite Mine – Ontario, Employment and Training*, (2015) online: <<https://natural-resources.canada.ca/maps-tools-publications/publications/musselwhite-mine-ontario>>.

¹⁶ Canada, Indigenous Services Canada, *Mandatory minimum 5% Indigenous procurement target*, (2024) Online: <<https://www.sac-isc.gc.ca/eng/1691786841904/1691786863431>>

¹⁷ Ontario, *Ontario Advancing Plan to Rebuild Pickering Nuclear Generating Station*, (January 23, 2025) Online: <<https://news.ontario.ca/en/release/1005620/ontario-advancing-plan-to-refurbish-pickering-nuclear-generating-station>>.

¹⁸ Ontario, *Construction Complete on Largest Indigenous-led Energy Project in Ontario's History*, (December 12, 2024), Online: <<https://news.ontario.ca/en/release/1005489/construction-complete-on-largest-indigenous-led-energy-project-in-ontarios-history>>.