



April 28, 2025

**VIA RESS**

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

Dear Ms. Marconi,

**Re: Enbridge Gas Distribution Inc. ("EGI")  
Application for exemption from leave to construct natural gas pipeline and  
associated facilities in the Town of Amherstburg  
Board File No.: EB-2024-0249**

We are counsel to Caldwell First Nation ("CFN") in the above-noted proceeding. Pursuant to Procedural Order No. 2, please find attached the written submissions of CFN in the above-noted proceeding.

Sincerely,

DT Vollmer

- c. All parties.  
Chief Nikki van Oirschot, CFN  
John Wladarski, Northwind Business Development Inc., CFN

## **ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the “**Act**”); and in particular subsection 95(2) thereof;

**AND IN THE MATTER OF** an application by Enbridge Gas Inc. (“**EGI**”) for an order granting an exemption from the requirement to obtain leave to construct natural gas distribution pipelines and ancillary facilities that make up a Community Expansion Project to serve the community of Boblo Island in the Town of Amherstburg.

**EB-2024-0249**

## **SUBMISSIONS**

**OF**

**CALDWELL FIRST NATION**

**April 28, 2025**

## I. INTRODUCTION

1. We are counsel to Caldwell First Nation ("**CFN**") in the matter of the application (the "**Application**") of Enbridge Gas Inc. (the "**Applicant**" or "**EGI**") to the Ontario Energy Board (the "**OEB**" or the "**Board**") for an order granting an exemption from the requirements to obtain leave to construct natural gas pipelines and facilities, as part of the Boblo Island "Community Expansion Project" in the Town of Amherstburg, Ontario (the "**Project**").
2. CFN is the only First Nation that sought and was granted full intervenor status in this proceeding.
3. CFN's traditional lands and territories include lands and water in Southern Ontario from the Detroit River, including Boblo Island, along the north shore of Lake Erie to Long Point, including Point Pelee and Pelee Island. CFN has a membership that consists of approximately 385 registered members. CFN's laws require CFN to preserve and even enhance a mutually respectful relationship with the Environment, to co-exist with Mother Earth, and to protect this relationship. CFN has the responsibility to care for its traditional territory for future generations, by preserving and protecting the wildlife, ecosystems, lands, waters, air, and resources throughout its territory.

## II. OVERVIEW

4. CFN's submissions proceed in two main parts as follows:
  - (a) The submissions will note the shortcomings of EGI's Application in the area of Indigenous consultation. The submissions note how notice and consultations must be made more effective moving forward in relation to the Project.
  - (b) The submissions will then address specific areas of interest to CFN, including:
    - a. The premature nature of the Application as a result of the ongoing uncertainty of First Nation jurisdiction over the project area;

- b. where CFN seeks more diligent collaboration for monitoring and reporting in relation to the relevant aspects of the Environmental Report, including the mitigation and protection measures for aquatic habitats, vegetation, and species of interest; and
  - c. where EGI's approach remains uncertain regarding First Nation partnership and participation in the Project in furtherance of economic reconciliation with CFN.
- 5. These submissions include various requests for relief. At the highest level, CFN requests that the Board:
  - (a) Note that discharging the duty to consult requires improving EGI's Indigenous consultation practices by being more proactive in facilitating CFN's involvement and incorporating a better understanding of CFN's rights, interests, and responsibilities; and
  - (b) Require EGI to supplement many of its proposed mitigation and environmental protection activities relating to the construction and longer-term impact of the Project.

### III. SUBMISSIONS

#### A. EGI's Engagement with CFN Must Improve

- 6. The Ministry of Energy (the "**Ministry**") identified CFN, among others, as an Indigenous community that should be consulted in relation to the current Application.<sup>1</sup>
- 7. CFN, along with Walpole Island First Nation (Bkejwanong) ("**WIFN**"), was identified as requiring EGI to undertake a deeper level of consultation than the other identified Indigenous communities.

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<sup>1</sup> Letter dated December 8, 2022, Exhibit H, Tab 1, Schedule 1, Attachment 2.

8. As part of the required deeper level of consultation, the Ministry directed EGI to, at minimum, (i) provide opportunities for CFN to share evidence or submissions about potential impacts, (ii) offer capacity funding to support meaningful participation in the consultation process, and (iii) demonstrate how any concerns raised by CFN were considered and responded to, and what impact they had on project decisions moving forward.
9. The OEB has recognized that the requirement for Indigenous consultations entails a number of important procedural elements,<sup>2</sup> including:
  - (a) Meeting with Indigenous communities to share the information necessary for communities to understand and assess the potential impact on Aboriginal or treaty rights;
  - (b) Responding to questions and concerns raised by Indigenous communities; and
  - (c) Discussing options to accommodate communities in respect of adverse effects on Aboriginal or treaty rights.
10. EGI's public-facing Indigenous Reconciliation Action Plan ("**IRAP**") and its Indigenous Peoples Policy ("**IPP**") support the position that First Nations are entitled to appropriate consultation and accommodation. They both include commitments concerning consultation with Indigenous Peoples as well respecting and upholding their rights.
11. The IPP is seen by EGI as consistent with the legal and constitutional rights possessed by Indigenous Peoples in Canada; the importance of the relationship between Indigenous peoples and their traditional lands and resources; and the need for early engagement to ensure timely exchanges of information to allow for project-specific concerns to be addressed.<sup>3</sup>

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<sup>2</sup> OEB's Environmental Guidelines, page 16:  
<https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2023-03/OEB-Environmental-Guidelines-for-Hydrocarbon-Projects-8th-Edition-20230328.pdf>.

<sup>3</sup> Exhibit I.CFN-1, response b).

12. Commitments and significant statements of principle from the IRAP and the IPP include:

- (a) EGI's recognition of the importance of the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>4</sup> ("UNDRIP") in the context of existing Canadian law;<sup>5</sup>
- (b) EGI's recognition of the legal and constitutional rights possessed by Indigenous Peoples in Canada and the importance of the relationship between Indigenous Peoples and their traditional lands and resources;<sup>6</sup>
- (c) EGI's stated principle to engage "early to achieve meaningful relationships with Indigenous groups by providing timely exchanges of information, understanding and addressing Indigenous project-specific concerns, and ensuring ongoing dialogue regarding its projects, their potential impacts and benefits";<sup>7</sup>
- (d) EGI's commitment to align "Enbridge's interests with those of Indigenous communities through meaningful, direct Indigenous economic activity in projects corresponding to community capacity and project needs, where possible."<sup>8</sup>

13. EGI noted that "a goal of Enbridge Gas's engagement is to aim to secure consent and avoid or mitigate any potential impacts the Project may have on Indigenous rights."<sup>9</sup>

14. The content of the constitutional duty to consult and accommodate must be informed by the application of the principles of UNDRIP, including a process that seeks to obtain the free, prior and informed consent of CFN in this proceeding. The Federal Court affirmed that:

"The words of the UNDRIP and the resulting commentary regarding its development and interpretation must be used to guide our interpretation of the

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<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, OHCHR, 33rd Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295.

<sup>5</sup> Exhibit H, paragraph 6.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Exhibit I.CFN-2, response f)

section 35 framework, and in this application, how the UNDRIP is to be used to interpret the Crown's analysis of the duty to consult and accommodate."<sup>10</sup>

15. Ongoing and sincere engagement that aims to achieve the support and agreement of CFN for the Project, including throughout the operational phase of the Project, must go beyond mere notification or one-way communication and be consistent with UNDRIP and CFN's customs and laws.<sup>11</sup> This approach is necessary to facilitate informed engagement and support the goal of securing CFN's free, prior, and informed consent and agreement consistent with CFN's constitutional rights and UNDRIP.<sup>12</sup>
16. EGI must take all reasonable steps to ensure that CFN has not only received but acknowledged the relevant information provided. Upon receipt of such acknowledgment, EGI should be required to schedule a meeting (in person or virtual) to meaningfully review and discuss the contents of reports, studies, and other project materials with CFN, including its Chief and Council and community members.
17. CFN submits that a more appropriate and effective approach that aligns with the OEB's stated objectives for Indigenous consultation involves proactively sharing the responsibility of ensuring that First Nations' histories, rights, and perspectives are meaningfully integrated into the Application and this proceeding. Consultation and engagement consistent with UNDRIP must be unique to each impacted First Nation and take into account their laws, customs, and policies. Rather than placing the full burden on First Nations to react to finalized materials under significant time and resource constraints, the consultation process should include earlier collaborative engagement that enables co-development of assessments and project planning. This would contribute to a more equitable and constructive process and better reflect EGI's and the OEB's commitments to reconciliation and Indigenous inclusion.

#### Requested Relief Relating to Indigenous Consultations

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<sup>10</sup> *Kebaowek*, at para 128.

<sup>11</sup> For example, in the *Case of the Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172, at para 133, the Inter-American Court of Human Rights recognized the importance of free, prior and informed consent, noting that to ensure effective participation of a community in the development of their territory, "the State has a duty to actively consult with said community according to their customs and traditions" (emphasis added); cited in *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319, at para 107 ("**Kebaowek**").

<sup>12</sup> See also *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para 76, where the SCC affirms that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. ("**Tsilhqot'in**")

18. To satisfy CFN's engagement and consultation expectations for all project proponents operating within its traditional territory, CFN requests that the OEB expressly note in its decision and make it a condition of any approval in this proceeding that EGI enhance its consultation practices with CFN to ensure that it follows CFN's consultation guidelines, customs, and laws.
19. Specifically, EGI should take proactive steps to ensure that CFN has the necessary operational, financial, and time-related capacity to receive, review, and meaningfully engage with project-related information, including documents, reports, and studies. This includes holding dedicated meetings with CFN, including with the community and Chief and Council, to enable direct discussion of these materials in alignment with EGI's stated policy of seeking the support and agreement of CFN and its members.
20. CFN also requests that the OEB work collaboratively with project proponents, First Nations, and Indigenous communities and organizations to revise the *Natural Gas Facilities Handbook* to include clearer guidance on the requirements and expectations applicable to leave to construct exemption applications and that the duty to consult is an process individualized for each impacted First Nation in accordance with their respective laws, customs, traditions, and policies.
21. CFN further recommends that the OEB develop a set of "Standard Conditions of Approval" specific to exemption applications under s. 95 of the Act, including those of the type brought forward in this proceeding. This work would improve the efficiency of exemption proceedings and better enable Indigenous intervenors to participate meaningfully and efficiently and protect their constitutionally recognized and protected rights.

**B. The Application is Premature While Aboriginal Rights and Title Remain Unresolved**

CFN's Asserted Title over the Project Area

22. CFN has the responsibility to care for the lands, waters, and all of creation as it relates to its treaty lands and traditional territories, including the entirety of the Project area and surrounding lands and waters.



23. This section addresses the ongoing uncertainty surrounding jurisdiction over the Project area and the premature nature of the Application in light of CFN's unresolved assertion of Aboriginal title and its potential impacts on CFN's Aboriginal rights and traditional use of Boblo Island.
24. CFN has consistently asserted Aboriginal title and associated Aboriginal rights and treaty rights in its traditional territory, including Boblo Island and the Project area, throughout the consultation and engagement process undertaken by EGI as part of the Application.<sup>13</sup> This includes the ongoing and continued exercising of CFN's Aboriginal rights and traditional use and associated activities by members of CFN on Boblo Island and in the Project area.
25. EGI also acknowledges that the Project area is of significant interest to WIFN and that it has been working to address WIFN's questions and concerns in relation to the Project. This includes WIFN's own claims to lands related to the Project area. Although EGI indicated that "regardless of the status of the WIFN land claim, Enbridge Gas's consultation with WIFN was focused on understanding how the Project may impact WIFN's interests, including asserted rights, and addressing any WIFN concerns with respect to the Project."<sup>14</sup>
26. The duty to consult arises where the Crown has real or constructive knowledge of potential Aboriginal rights or title and is contemplating conduct that may adversely affect these rights.<sup>15</sup> Where rights are asserted but not yet proven, the duty to consult still applies and must be carried out with a view to a process for achieving ultimate reconciliation.<sup>16</sup>
27. EGI acknowledged that CFN has a responsibility to care for the lands, waters and all of creation as it relates to the territories that include the Project area.<sup>17</sup> EGI also recognized

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<sup>13</sup> Exhibit H, Tab 1, Schedule 1, Attachment 6, p. 3; Exhibit H, Tab 1, Schedule 1, Attachment 7, p. 26; Environmental Report, CFN comments pp. 2, 3, 9, 11; Exhibit I.CFN-2; Exhibit I.CFN-3.

<sup>14</sup> EGI, "OEB Additional Information Requests", (April 11, 2025), p. 2.

<sup>15</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para 35. ("**Haida**")

<sup>16</sup> *Ibid.*, at para 38.

<sup>17</sup> Exhibit I.CFN-3, response b), p. 2.

that CFN's interests, which include its rights and stewardship obligations, may be potentially impacted by the Project.

28. The Project and the surrounding area are part of a larger pattern of development on Boblo Island to which CFN has not consented. Where Aboriginal interests have been asserted but not yet proven, the Crown and its agents, which include the Applicant and the OEB in this proceeding, must respect and act in a manner that does not pre-empt or undermine such claims while they are being pursued.<sup>18</sup>
29. EGI maintains that it is committed to engaging meaningfully with CFN on an ongoing basis throughout the lifecycle of the Project, including the operational phase, in relation to impacts on CFN's rights, interests, and obligations in the Project area.
30. The Project contributes to the cumulative impacts of ongoing development, which have already resulted in the effective erasure of at least half of Boblo Island's potential, contemporary, traditional, and historical use by CFN and its members. These uses include fishing, hunting, harvesting, and CFN's ceremonial and spiritual practices that are deeply connected to the lands and waters of Boblo Island.
31. CFN respectfully requests that the OEB acknowledge the historic and ongoing infringement of CFN's asserted Aboriginal title and rights in relation to Boblo Island and the barriers this has caused to CFN's traditional and spiritual use of the lands and waters throughout the Project area.

#### CFN's Water Assertion

32. CFN's asserted Aboriginal title and rights protected under section 35(1) of the *Constitution Act, 1982* in the Project area and throughout its traditional lands and territories, includes rights and title to the waterways, groundwater, lakebeds, and riverbeds, as well as subsurface rights and title to the space beneath the land and water. These asserted rights apply across CFN's traditional territory, including Boblo Island and the entirety of the Project area.

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<sup>18</sup> *Haida*, at para 27.

33. CFN alerted the Applicant to its asserted rights and title to the waters in the Project area throughout the consultation process, including CFN's comments on the draft Environmental Report.<sup>19</sup>
34. CFN remains concerned that activities in the Project area, not only may potentially impact CFN's constitutionally protected and asserted Aboriginal and treaty rights associated with its water and subsurface rights, but also that there have been no discussions of compensating CFN for the use and damage of the waters in CFN's traditional territory, including by the Applicant in the Project area.
35. CFN's assertion of Aboriginal and treaty Rights, including Aboriginal title to Boblo Island and the surrounding waters, requires EGI to seek the express permission from CFN through its Chief and Council for the proposed Project. CFN reminded EGI that its express permission is required prior to any usage of the lands, water, or subsurface by the Applicant on Boblo Island and relevant areas of the Town of Amherst in the Project area as part of the proposed Project.<sup>20</sup>
36. CFN remains concerned that the Applicant has not formally sought the express permission and consent of CFN to undertake activities that may impact its rights associated with the waters in the Project area. Failure to obtain CFN's express permission and consent is a violation of the rights, title and laws of CFN and is inconsistent with the constitutionally protected rights of CFN, and as such rights should be interpreted through UNDRIP's normative framework.

*The Application is Premature*

37. Governments and others seeking to use land must obtain the consent of the Aboriginal title holders.<sup>21</sup> CFN submits that the Application is premature in light of the ongoing and unresolved assertion of Aboriginal title and associated rights in the Project area.
38. CFN holds and continues to assert Aboriginal title and rights throughout its traditional territory, including Boblo Island and the surrounding waters, lands, and subsurface.

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<sup>19</sup> Draft Environmental Report, comments of CFN, p. 11.

<sup>20</sup> Draft Environmental Report, comments of CFN, p. 3.

<sup>21</sup> *Tsilhqot'in*, at para 76.

These rights are protected under section 35(1) of the *Constitution Act, 1982* and have been repeatedly communicated to the Applicant.

39. Approving the Project creates significant risks following the SCC's warning that "[i]f the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."<sup>22</sup>
40. The OEB, which has stepped into the shoes of the Crown, must act honourably in its dealings with CFN in this Application. This means that OEB must ensure that it does not "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests."<sup>23</sup> This includes CFN's ongoing assertion of Aboriginal title over the Project area, which is in the early stages of being pursued through the lengthy and complex processes of negotiation and potential litigation.
41. CFN has the duty and responsibility to care for its traditional lands and waters and has never consented to the cumulative development that has occurred on Boblo Island, including with respect to the proposed Project.
42. The impacts of ongoing development have significantly diminished CFN's ability to exercise its rights in and traditional use of Boblo Island, including hunting, fishing, harvesting, and ceremonial and spiritual practices intimately tied to the waters and land of Boblo Island. The Project risks further compounding these cumulative impacts, yet the Applicant has not obtained CFN's express permission to proceed prior to seeking an order from the Board in this proceeding.
43. Importantly, CFN has made clear to the Applicant that the exercise of its rights and title in the Project area, including Aboriginal title to Boblo Island and surrounding waters, requires the express permission of CFN through its members and Chief and Council.

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<sup>22</sup> *Ibid.*, at para 92.

<sup>23</sup> *Haida*, at para 27.

44. To date, EGI has not formally sought or obtained this permission. Proceeding with the Project in the absence of such permission would not only violate CFN's asserted and constitutionally protected rights and laws, but would also undermine the honour of the Crown, an outcome that is wholly incompatible with advancing reconciliation and EGI's own policies articulated through the IPP and IRAP.
45. The Application does not meaningfully address the jurisdictional complexity created by overlapping or unresolved land and title claims in the Project area. In addition to CFN's assertions, EGI has acknowledged that the Project area is also the subject of a land claim by WIFN. The unresolved nature of these overlapping claims further underscores the inappropriateness of determining that the duty to consult has been discharged for a Project that could prejudice the rights and interests of at least two First Nations in advance of a fair resolution of such claims.
46. In CFN's view, the unresolved assertions of rights and title and the absence of CFN's express consent represent critical gaps in the Application and this proceeding. This undermines the integrity of the consultation process relied upon by the Applicant, raises serious questions about the Project's potential to infringe s. 35 rights, and ultimately renders the Application premature. CFN requests that the Board engage with and acknowledge this gap in its decision.

### **C. Specific Environmental Interests**

#### *Aquatic Habitats*

47. CFN takes seriously its responsibilities as stewards of the aquatic habitats and ecosystems within its traditional lands and waters, including the protection and preservation of aquatic life.
48. EGI indicated that it has assessed the potential impacts of the Project on environmental features, such as water resources, and has developed mitigation measures for the purpose of minimizing those impacts and that watercourse crossing will be constructed

via trenchless construction methods (i.e., horizontal directional drilling), which will mitigate the environmental effects on the waterway.<sup>24</sup>

49. CFN is concerned about impacts of water discharges on aquatic species of interests in the Project area and surrounding waterways, including the Detroit River. Adequate monitoring and reporting are required to mitigate any potential risks to species of interest to CFN.
50. The Environmental Report notes that “[w]ith the implementation of the HDD construction method and the mitigation and protective measures, no adverse residual impacts on aquatic features are anticipated.”<sup>25</sup>
51. CFN acknowledges and appreciates that the watercourse crossing will be constructed using HDD, which is expected to minimize environmental effects on the waterway.<sup>26</sup> However, the current application does not impose any ongoing obligation on EGI to report risks, incidents, or impacts to aquatic habitats and aquatic life in the Project area to CFN.
52. CFN requests that the OEB include the following in any order:
  - (a) EGI be required to adhere strictly to the mitigation and protective measures set out in the Environmental Report, for all activities that may impact CFN’s rights to all waters implicated in the Project area, and any other activities that impact or have the potential to impact CFN’s Aboriginal rights associated with the waters in the Project area; and
  - (b) EGI should be required to propose a plan for ongoing testing and monitoring of aquatic habitats and aquatic life during the construction phase. This plan should be subject to review and comment by CFN, with recourse to the OEB in the event of dispute, prior to implementation. It should also include provisions for regular reporting and communications with CFN, and for

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<sup>24</sup> Exhibit I.CFN-10, p. 2

<sup>25</sup> Environmental Report, p. 64.

<sup>26</sup> Exhibit I.CFN-10.

providing capacity funding to CFN if it is determined that ongoing monitoring is necessary to protect aquatic species and habitats.

### Vegetation

53. CFN is concerned that EGI has not committed to meaningful Indigenous participation in the post-construction vegetation monitoring and restoration process. EGI's responses confirm that while it has developed a management plan, its commitment to include CFN in post-construction and restoration monitoring walkthroughs is conditional, as it will only extend that opportunity if the OEB requires EGI to file a post-construction report and final monitoring report as a condition of approval.<sup>27</sup>
54. This approach falls short of ensuring that CFN's values, traditional knowledge, and concerns about local species and land use are reflected in restoration and vegetation management efforts.
55. EGI's interrogatory responses include a general commitment to restore the Project area to pre-construction conditions or better.<sup>28</sup> However, EGI has not committed to engaging CFN meaningfully in the development of the restoration plan or in defining what constitutes pre-construction conditions from CFN's perspective. Instead, EGI's responses suggest that CFN's involvement in site restoration efforts is contingent on OEB-imposed conditions and limited to participation during post-construction monitoring walkthroughs.
56. The knowledge, responsibilities, and perspectives of CFN, grounded in its deep cultural, spiritual, and ecological connection to the lands and waters of Boblo Island, must form an essential part of establishing pre-construction conditions and defining what constitutes an acceptable and culturally appropriate restoration plan. This includes identifying culturally significant species, land uses, and ecological relationships that may not be captured in conventional environmental assessments or by the Environmental Report.

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<sup>27</sup> Exhibit I.CFN-7, response h).

<sup>28</sup> *Ibid.*, response f).

57. CFN requests that the OEB include the following in any order:

- (a) EGI should be required to prepare and file a post-construction monitoring report;
- (b) CFN should be offered the opportunity to participate in post-construction and restoration monitoring walkthroughs, including with capacity funding;
- (c) CFN should be provided with sufficient time and capacity funding to review and comment on the monitoring and restoration reports prior to their finalization and submission to the OEB; and
- (d) EGI's mitigation and protective measures specific to forest and vegetation cover, should be updated, in consultation with CFN, to incorporate traditional ecological knowledge and site-specific concerns related to culturally important species and land use practices.

*Species of Interest and Species at Risk*

- 58. CFN places a high priority on the protection of wildlife and wildlife habitat in the Project area, and has advised EGI that there are various species of significant interest to CFN and its members that may not be listed under provincial or federal species-at-risk legislation.
- 59. EGI stated that its “goal is to work together to identify and mitigate any potential impacts on these species [of interest], and to incorporate CFN’s traditional knowledge into Enbridge Gas’s studies.”<sup>29</sup>
- 60. CFN is particularly concerned about potential disturbances to trees that may serve as nesting sites for Migizi (Bald Eagle), a species of deep cultural significance to CFN, during the construction phase of the Project.

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<sup>29</sup> Exhibit I.CFN-5, response e).



61. Despite CFN's request that EGI conduct nest sweeps within 48 hours of construction activities, instead of the seven-day window recommended in the Environmental Report, EGI has declined to adopt this enhanced monitoring measure.<sup>30</sup> CFN believes the 48-hour window would provide a significantly higher level of confidence in identifying active use of trees and nests by Migizi and other species of interest, thereby strengthening protections during critical phases of construction.
62. EGI has committed to providing CFN "with an opportunity to participate as a monitor during sweeps and will provide CFN with reasonable compensation for their time to complete the sweeps."<sup>31</sup>
63. EGI has committed to sharing (i) significant wildlife encounters or incidents, as well as any discoveries of active wildlife habitat that reasonably raise the question of whether to suspend construction, (ii) Species at Risk encounters with CFN should they occur, and (iii) the discovery of reptilian or amphibian nests or habitat during construction activities.<sup>32</sup>
64. CFN has requested that EGI expand this commitment to include reporting on all encounters with Species of Interest to CFN throughout all phases of the Project. In support of this, CFN intends to work with EGI to better inform EGI of Species of Interest to CFN, including by potentially providing a copy of a list of Species of Interest in the Project area.
65. CFN therefore requests that the OEB include the following in any order:
  - (a) A requirement for EGI to sweep for nests within 48 hours of construction activities;
  - (b) A requirement that EGI provide capacity funding and the opportunity for CFN to participate as a monitor during all pre-construction wildlife and nest surveys, including prior to any tree removal; and

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<sup>30</sup> Exhibit I.CFN-8, response c).

<sup>31</sup> Exhibit I.CFN-8, response e).

<sup>32</sup> Exhibit I.CFN-8, responses a), b), and d).

- (c) A requirement that EGI fulfill its commitments to report to CFN on significant wildlife encounters or incidents, encounters with species at risk, and all encounters with CFN's identified Species of Interest during all phases of the Project.

Environmental Protection Plan

- 66. Enbridge Gas has committed to considering mitigation measures recommended by Indigenous communities, including CFN, and to including agreed-upon measures in the final Environmental Protection Plan ("**EPP**"). However, CFN remains concerned that the EPP will not be finalized or shared until all environmental permits and approvals are obtained, and immediately prior to construction, leaving limited opportunity for CFN to meaningfully review or influence its contents.<sup>33</sup>
- 67. CFN respectfully submits that post-approval engagement on mitigation and the EPP is insufficient to satisfy the requirements of meaningful consultation. A process that permits review only after the finalization of the EPP, with no mechanism to resolve disagreement, falls short of the required duty to consult expectations.<sup>34</sup> Accordingly, the Board must ensure that CFN is provided a genuine opportunity to influence the EPP before it is finalized.
- 68. CFN requests that the OEB include the following conditions in any order:
  - (a) EGI must provide CFN with a draft of the EPP in a reasonable amount of time prior to its finalization, to allow for meaningful review and feedback;
  - (b) EGI must engage in good faith discussions with CFN regarding any recommended mitigation or protection measures proposed by CFN, including those informed by CFN's traditional ecological knowledge;
  - (c) EGI must provide a written explanation outlining the rationale for excluding any mitigation measures recommended by CFN that are not adopted, including any constraints cited; and

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<sup>33</sup> Exhibit I.CFN-11, response a)-b).

<sup>34</sup> See *Haida*, at para 44.

- (d) The final EPP must document all Indigenous community input received, including a summary of how each recommendation was addressed, and the final EPP must be shared with the OEB as part of any post-approval filings.

#### **D. Commitments for Indigenous Economic Inclusions**

69. As noted above, CFN has not been directly compensated for the use, or potential impacts on, its traditional territory, which includes the Project area.
70. Indigenous economic inclusion is a vital component of reconciliation and a necessary step toward addressing the historical and ongoing exclusion of CFN from meaningful participation in, and benefit from, the development of its lands, waters, and resources.
71. The honour of the Crown requires that the Board ensure that its decisions do not unjustly limit or remove benefits from impacted First Nations while Aboriginal title and rights claims are being pursued and resolved.<sup>35</sup>
72. EGI noted that it is meeting with Indigenous communities, including CFN, to explore opportunities to advance innovative partnerships and economic inclusion and that it “is generally considering options for equity participation on Enbridge Gas projects within Ontario, including new infrastructure assets.” However, pursuing economic inclusion “rests with Enbridge Gas and the Indigenous groups to which opportunities may be available and offered.”<sup>36</sup>
73. EGI further noted that “there are regulatory and financial barriers that exist for equity sharing on OEB-regulated Enbridge Gas assets, such as financing costs, profitability, a potential need to transfer assets to a new entity, OEB approvals including a Certificate of Public Convenience and Necessity, franchise agreement, rate order, and regulatory obligations pursuant to OEB rules and Technical Standards and Safety Authority requirements.”<sup>37</sup>

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<sup>35</sup> For example, in *Haida*, at para 27, the SCC indicated that “To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.”

<sup>36</sup> Exhibit I.CFN-2, response g).

<sup>37</sup> *Ibid.*

74. CFN therefore respectfully submits that any order made by the OEB should not impede the ability of CFN and EGI to explore or pursue equity participation in the proposed Project, should both parties wish to do so.
75. CFN further requests that the OEB take a more active role in supporting benefit and equity participation and, in consultation with First Nations, Indigenous communities, and organizations, consider the development of specific guidance on how equity participation, and other forms of economic inclusion, can be facilitated and supported by the OEB in projects that require OEB approvals and/or orders.

## **V. COSTS**

76. CFN respectfully submits that it has participated responsibly in this proceeding with a view to maximizing its assistance to the Board, and therefore requests that the Board order reimbursement of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED THIS

28<sup>th</sup> day of April, 2025

A handwritten signature in black ink, appearing to read "DT Vollmer", written over a horizontal line.

DT Vollmer  
Resilient LLP  
Counsel for CFN