ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, c. 15, Sched. B;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for authority to expropriate land for the purpose of an electricity transmission line in the City of Port Colborne;

SURREPLY OF NYON OIL INC. AND 1170367 ONTARIO INC.

September 5, 2025

REQUEST FOR LEAVE TO FILE SURREPLY

1. Hydro One Networks Inc. (**"Hydro One"**) filed its Reply on August 22, 2025. In its Reply, Hydro One failed to follow the standard rules applicable to all Reply materials, in that it introduced new theories and arguments that were not set out in its Argument-in-Chief (**"AIN"**).[1]

2. The Intervenors, Nyon Oil Inc. and 1170367 Ontario Inc. (together **"Nyon"**) were entitled to know and respond to all of the substantive arguments that Hydro One was relying on, as there is no further formal opportunity to make submissions.[2] Hydro One was obliged to put its best foot forward. In *Deegan v. Canada (Attorney General)*, Madam Justice Mactavish set out the limits of Reply as follows:

> [121] It is a well-established principle that new arguments are not the proper subject of Reply. The purpose of a Reply is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance. Proper Reply is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated.[3]

3. Nyon respectfully requests that the Ontario Energy Board (the **"Board"**) strike the following portions of Hydro One's Reply submissions that set out fresh theories and arguments: paragraphs 4, 12-14, 16, 17, 20, the last two sentences of paragraph 21, paragraph 23, the last two sentences of paragraph 48, paragraph 49, the last two sentences of paragraph 50, and paragraphs 55-57.

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[1] Reply submissions are not an opportunity for a party to raise issues that should have been raised in its initial submissions or to reformulate its argument. The purpose of the reply is for the party bearing the onus in the dispute to respond to any issues that were raised in the other party's submissions which could not have been reasonably raised in initial submissions.

[2] *Murphy v. Canada (Attorney General)*, 2023 FC 57 (CanLII) at para 39.

[3] *Deegan v. Canada (Attorney General)*, 2019 FC 960 (CanLII), [2020] 1 FCR 411 at para 121.

4. In the alternative, Nyon requests the Board grant it leave to submit a Surreply in the form set out in Appendix A to address the fresh theories and arguments that Hydro One included in its Reply submissions.

APPENDIX A

Surreply Table of Contents

SURREPLY

A. Jurisdiction to authorize the expropriation

1. At paragraph 4 of its Reply, Hydro One incorrectly stated that a 2012 decision by the Board regarding an Enbridge pipeline stands for the proposition that the authority to expropriate transmission lines can be granted even when the construction was not approved under PART VI of the OEB Act or a predecessor of PART VI. Hydro One stated:

> 4. Hydro One provided the Board with an analogous case in which the Board exercised its discretion and found that it was in the public interest to grant Enbridge the authority to expropriate land for an existing natural gas distribution main that had been approved to be constructed long before the enactment of the 1990 *OEB Act*. **The Enbridge expropriation demonstrates that authority to expropriate may be granted even where the relevant infrastructure was approved for construction through legislative mechanisms that predate the 1990 *OEB Act.***[4] [Emphasis added].

2. The Enbridge case that Hydro One is referring to is *Re Enbridge Gas Distribution Inc.*[5] This case did not stand for the principle that the authority to expropriate may be granted even where the relevant infrastructure was approved for construction through legislative mechanisms that predated the 1990 *Ontario Energy Board Act*.[6] Not only does *Re Enbridge Gas Distribution Inc.* not stand for that principle, but it did not even address it. It is unreasonable for Hydro One to suggest to the Board otherwise.

3. *Re Enbridge Gas Distribution Inc.* was a 20-paragraph decision from June 2012 that emanated from a hearing in writing and where there is no suggestion that the

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[4] Hydro One's Reply Submissions, at para 4.
[5] Hydro One's AIC, at paras. 116-117, citing *Re Enbridge Gas Distribution Inc.*, 2012 CarswellOnt 11005 (OEB, EB-2011-0391).
[6] R.S.O. 1990, c. O.13.

parties addressed the leave requirement set out in s. 99(1) of the *Ontario Energy Board Act, 1998*, (the **"Act"**).[7] The only substantive findings by the Board in that case were made in four paragraphs and were limited to the public interest analysis required by s. 99(5). There was no analysis of the leave requirement in s. 99(1) whatsoever, or even a reference to it. There were no Responding submissions from intervenors or interested parties, and accordingly, there were no Reply submissions from the applicant.

4. In the matter currently before the Board, there is not one piece of evidence in the record to support that Hydro One had leave to construct the Existing Transmission Lines. Regardless of whether the legislative interpretation set out by Hydro One in its AIC can be construed to include an Order-in-Council (**"OIC"**) as "leave to construct" under a predecessor of the Act, Hydro One has not produced an OIC for the Existing Transmission Lines. Accordingly, even analyzing Hydro One's complex legislative interpretation argument regarding s. 99(1) leave is unnecessary and inappropriate because there is no evidence to support the necessary elements that argument is predicated on.

5. There is no suggestion that any analysis was undertaken by the Board with respect to this issue in *Re Enbridge Gas Distribution Inc.* and to suggest that the decision stands for that proposition is wrong. It does not.

[7] S.O. 1998, c. 15, Sch B.

B. Jurisdiction to determine property rights related to the Existing Transmission Lines.

6. At paragraphs 12 to 14 of Hydro One's Reply submissions, it advances a new theory to suggest that Nyon has agreed that the Board has jurisdiction to determine property rights related to the Existing Transmission Lines. To be clear, and as set out in Nyon's Responding submissions, Nyon does not agree that the Board has jurisdiction to determine private property rights disputes, including the dispute between Nyon and Hydro One regarding the Existing Transmission Lines.

7. For the first time, at paragraph 14 of its Reply, Hydro One states:

> 14. In Nyon's letter to the Board dated February 13, 2025, it again asserted that Hydro One does not own the Existing Transmission Lines, and that Nyon's "ownership of [the Existing Transmission Lines] and the chain of title is clear." Nyon then expressed its understanding that "Hydro One's application does not include a request to expropriate the transmission infrastructure should the OEB determine that our clients own it."

8. Nowhere in this letter did Nyon consent to the jurisdiction of the Board to determine property rights related to the Existing Transmission Lines. However, Nyon did recognize that a potential outcome of the hearing is that the Board **may** decide that it has the jurisdiction to make a determination of property rights related to the Existing Transmission Lines, and if it does so, and should the Board determine that Nyon owns the Existing Transmission Lines, Hydro One has not made the correct application to the Board. In short, Hydro One has brought the wrong application. It has brought an application to expropriate an easement, but it also wants the Board to assume jurisdiction to determine property rights related to the infrastructure as well. If the Board

grants leave to Hydro One under s. 99(1), and then authorizes it to expropriate in the public interest pursuant to s. 99(5), and then if the Board assumes jurisdiction to determine who is the owner of the Existing Transmission Lines, it may very well determine that Nyon is the owner of the Existing Transmission Lines, which leaves Hydro One in the position where it still does not own the entirety of the assets it seeks. Hydro One brought the wrong application. That is what Nyon was stating in its letter; it was not consenting to the Board's jurisdiction to determine who is the owner of the Existing Transmission Lines.

9. Similarly, at paragraph 16 of its Reply, for the first time, Hydro One states that Nyon issuing a Notice of Constitutional Question prevents Nyon from arguing that the Board does not have the jurisdiction to determine the property rights related to the ownership of the Existing Transmission Lines. Should the Board assume jurisdiction of this issue, it will have to make a constitutional determination. Rule 36 of the Ontario Energy Board Rules of Practice and Procedure ***required*** Nyon to serve and file a Notice of Constitutional Question. For these reasons and the reasons stated above, Nyon did not consent to the Board's jurisdiction to determine the property rights related to the Existing Transmission Infrastructure by filing a Notice of Constitutional Question.

10. Similarly, at paragraph 17, again, for the first time, Hydro One argues that Nyon's submissions are a collateral attack because the Board's jurisdiction to determine private property rights related to the Existing Transmission Lines was determined by Justice Ramsay at a stay motion. This submission and the paragraph snippet included in Hydro One's Reply is, respectfully, misleading. At that motion, Justice Ramsay heard no

submissions, whatsoever, or even submissions tangentially related to what may be included in the Board's jurisdiction. The entirety of Justice Ramsay's decision at the motion was focused on whether the civil action should be stayed for one year to allow the expropriation application to proceed first.[8] Those were the only issues that were put before His Honour by Hydro One. It is illogical that the party that brought the motion and requested the relief – Hydro One – is now suggesting that His Honour's decision from the motion provides precedent for a completely unrelated and wholly undiscussed principle (being the jurisdiction of the Board to determine the property rights related to the Existing Transmission Lines). There is no obligation for parties to appeal statements made in *obiter* that are not related to the outcome of the hearing.[9]

11. 'Obiter' is a statement made by a Judge that is not essential for the decision of the case.[10] The issue being determined at the motion referenced by Hydro One was: should a temporary stay of the civil action should be granted to allow the expropriation application to proceed first? It was not: does the Ontario Energy Board have jurisdiction to determine property rights relating to the Existing Transmission Lines?

C. Hydro One suggests that the Board can 'read-in' the intention of the Seaway not to expropriate complete property interests through the Master Agreement and Supplemental Agreement

12. At paragraphs 20 and 21, for the first time, Hydro One suggests that when the Seaway expropriated the entirety of the lands in 1965 and 1968, it purposefully omitted the transmission infrastructure on the lands from those expropriations. That is wrong.

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[8] *Nyon Oil Inc. v. Hydro One Networks Inc.*, 2025 ONSC 1921 (CanLII).

[10] See *Ex parte Pickett*, 1976 CanLII 632 (ON CA).

Nowhere in the legislation permitting the expropriation; the OIC authorizing the expropriation; or in any other document from the time of expropriation, does the Seaway limit what it is expropriating. To 'read-in' an exception or limitation to an expropriation by virtue of uncertain language in post-expropriation agreements that were entered into many years **after the expropriation was carried out without exception**, is not only wrong, but an incredibly dangerous precedent. It would lead to uncertain expropriation results. Fee simple expropriations, like the one completed by the Seaway, are meant to be complete, final and a whole transfer of property rights from the owner to the expropriating authority.

D. The easement requested by Hydro One comports to its "legal and policy objectives"

13. At paragraph 49, in defense of their request for an easement with a width less than what they demanded from Nyon in 2013, for the first time, Hydro One has suggested "The size of Hydro One's proposed taking comports with the legal and policy objectives of minimizing the impacts of expropriation on fee simple owners." Hydro One has provided no evidence of these referenced "legal and policy objectives" – the only evidence in the record is that Hydro One demanded the setbacks reflected in R Plan 59R-15312 from Nyon in 2013, which setbacks are 75 meters or more. Hydro One threatened that it would interfere with Nyon's upcoming Ontario Municipal Board hearing if Nyon did not accede to that request. Ultimately, Nyon agreed for those setbacks to be

included in the site specific zoning by-law, and Hydro One did not interfere with Nyon's OMB hearing. That is the only evidence in the record.[11]

14. Those same setbacks are built into the Asahi Kasei site plan, which factory is being built immediately adjacent to the Nyon lands. The reality is Hydro One is now trying to expropriate a smaller easement than it previously insisted was necessary to operate the Existing Transmission Lines safely. If the Board authorizes Hydro One to expropriate an easement of considerably smaller width, it will effectively leave a significant portion of Nyon's lands on an unusable and narrow island between the Asahi Kasei lithium-ion battery plant and the corridor for the Existing Transmission Lines. That is a wholly unfair and an unjust result, especially in light of the history of how those setbacks came to be.

E. The Application to Expropriate is necessary because Nyon is enforcing its property rights

15. At paragraph 55 of its Reply, for the first time, Hydro One advances the incorrect position that the application to expropriate is only necessary because Nyon commenced litigation. This is not sensical. Hydro One is a for-profit, publicly traded company – it must pay for its use of private property, just as any other arm's length party would have to. Hydro One is not entitled to usurp the private property of another for over a decade without paying any compensation. This application was only necessary because Hydro

[11] Nyon's Supplementary Evidence, dated June 10, 2025 – Document 1: Internal Hydro One email re: the necessity of a 75m setback on Nyon Lands; Document 2: Email from Nyon's counsel agreeing to the requested 75m setback; Document 3: Revised zoning bylaw requiring 75m setback; Document 4: Internal Hydro One Emails re: language in bylaw regarding 75m setback; Document 5: Email correspondence between Nyon and Hydro One's counsel regarding 75m setback bylaw.

One continued operating the Existing Transmission Lines on Nyon's property, for a profit, without any property or contractual right to do so.

F. Economic windfall

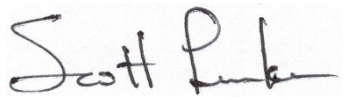
16. At paragraph 57, Hydro One improperly repeats submissions from its AIC where it launched an allegation that Nyon was in "search of an economic windfall" and by contrast Hydro One was acting solely in the public interest. This could not be further from the truth. Nyon is only enforcing its private property rights. Demanding fair compensation for the use of nearly 70 acres of property and significant transmission infrastructure by a publicly traded, for-profit company is not a search for a windfall. If anything, it is Hydro One that is searching for a windfall, as it constantly puts forward new and novel arguments as to why it should not have to pay for its use of property that it does not own or otherwise have a right to (among other things).

G. Conclusion

17. In this Surreply, Nyon has only responded to theories, arguments and evidence that Hydro One advanced for the first time in its Reply.

18. Advancing new arguments in its Reply was an abuse of process. Some of those new arguments were specious, and the only logical conclusion is that Hydro One purposefully waited until Reply to advance them so that they would go unchallenged. That is yet another abuse of process. This Surreply should not have been necessary.

DATED THE 5th DAY OF SEPTEMBER, 2025, AT TORONTO, ONTARIO.



Nyon Oil Inc. and 1170367 Ontario Inc.
By their counsel

Massey LLP
Per: Scott Lemke, Frank Portman, Alexa Cheung