



November 24, 2022

**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 Inc. (EGI)  
Dawn to Corunna Replacement Project (Project)  
Board File Number: EB-2022-0086**

We are counsel to Three Fires Group Inc. (**Three Fires**) in the above-noted proceeding (the **Proceeding**). This letter responds to EGI's letter dated November 17, 2022 (the **Letter**) which challenges Three Fires' cost claim in the Proceeding.

Three Fires' engagement in this Proceeding reflects an important effort to protect and advance the rights of EGI's Indigenous customers in a cost effective and efficient manner. In particular, EGI's proposals implicated the interests of its Indigenous customers on a wide range of discrete and complex issues, as reflected in Three Fires' submissions at all stages of the Proceeding, and as set out in further detail below. Notwithstanding this wide-ranging complexity, Three Fires ensured that its intervention was focused solely on (i) asserting and protecting the rights of the Chippewas of Kettle and Stony Point First Nation (**CKSPFN**) and Caldwell First Nation (**CFN**, and together the **Three Fires First Nations**), (ii) advancing specific and overlapping concerns regarding the Project, and (iii) addressing the known and potential impacts of the Project on the respective Aboriginal and treaty rights of the Three Fires First Nations.

Furthermore, EGI's conduct in these proceedings exacerbated the inherent challenge and complexity of any response from Three Fires. EGI should not be entitled to shift the burden of costs that arise as an inevitable consequence of EGI's own documented shortcomings in this matter. In particular, Three Fires' existing submissions set out EGI's general failure to comply with its duty to consult its Indigenous partners, most notably arising from EGI's significant delay in commencing consultations and engagement. EGI's failure made virtually impossible any narrowing of the issues of relevance to the individuals living in the two First Nations that Three Fires represents. EGI's shortcomings with respect to its consultations outside of the Proceeding also meant that Three Fires was compelled to investigate and address the full complexity of these issues almost entirely in the context of the Proceeding.

Finally, Three Fires notes that a portion of its costs reflects the need to retain both legal counsel and technical consultants to provide legal and technical advice in the Proceeding. Three Fires' consultants play an essential role in coordinating and communicating with the leadership of the Three Fires First Nations and their members, ensuring Indigenous participation in the Proceeding, and providing important context to the Board regarding the unique circumstances of EGI's Indigenous customers impacted by the Project. They were especially necessary given the natural complexities of this Proceeding, exacerbated by EGI's shortcomings in its consultations, as noted above. As set out in further detail below, Three Fires' consultants and lawyers worked in an efficient manner, making use of the expertise that the consultants provided where necessary and delegating the majority of work to more junior lawyers at lower rates.

As a result, in the absence of more effective consultations on the part of EGI at earlier stages of the project, the only effective way for Three Fires to limit its costs in this Proceeding would have been to limit the range of its participation. A cost decision limiting Three Fires' entitlement would therefore not only disregard EGI's consultation shortcomings and the effects arising from those shortcomings, it could also easily discourage future First Nation and other Indigenous participants before the OEB from addressing the full range of issues that they identify as being of significance to the lives of the people living in their communities.

### **EGI's failure to consult in a timely manner caused unnecessary delay and increased costs**

EGI's documented failure to consult early with the Three Fires First Nations<sup>1</sup> forced Three Fires' representatives to spend a significant amount of time reviewing, analyzing, and testing the extensive evidence provided by EGI in the Proceeding. EGI's failure to consult and engage with the Three Fires First Nations in a timely manner, long after it came to any decisions on the specifics of the Project, resulted in adding unnecessary complexity to the Proceeding. Three Fires intervened in the Proceeding to ensure that the Board was made aware of the ongoing and anticipated impacts of EGI's expanding natural gas infrastructure on ongoing habitat deterioration, the cultural history and heritage of the Three Fires First Nations, and community health and safety impacts, all of which continue to negatively impact many Indigenous communities and customers in EGI's service territory.

Three Fires spent considerable time prior to and during the Proceeding attempting to obtain from EGI information on: (i) project alternatives, (ii) fugitive emissions data, (iii) relevant policy documents, (iv) route maps, and (v) potentially impacted species at risk identified by CKSPFN. Three Fires submissions highlighted many of these issues and, in the view of Three Fires, deficiencies in the Proceeding and EGI's engagement with impacted First Nations on these issues, in order to ensure that the Board was fully informed of the impacts of its decision and order in the Proceeding.

Three Fires submits that the timing of its review and consideration of relevant and important issues for the Three Fires First Nations was accordingly extended by EGI's documented failure to consult at the earliest stages of its determination of the need for the Project and the considerable delay in providing specific documents and data materials requested by the Three Fires First Nations at numerous engagement points prior to and throughout the Proceeding. Three Fires submits that it should not be unduly burdened for incurring its claimed costs that

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<sup>1</sup> See OEB Decision and Order, EB-2022-0086, p. 25; EB-2022-0086, Submissions of Three Fires, paras 6-12.

were necessary to ensure that the constitutionally protected rights of the Three Fires First Nations were fully considered and addressed by both EGI and the Board.

### **EGI's delays exacerbated the complexity and time spent on issues important to the individual members of the Three Fires First Nations**

EGI's delays in engaging with the Three Fires First Nations resulted in Three Fires spending an increased amount of time and resources on understanding the Project and its impacts on the rights and interests of the Three Fires First Nations. The delay in engaging resulted in a need to quickly review the enormous amounts of documents submitted as evidence in the Proceeding. Accordingly, Three Fires determined that it was necessary to retain consultants and legal representatives to assist with a review of EGI's evidence and conduct regarding:

- the environmental report;
- the duty to consult and accommodate;
- Indigenous Peoples' right to require their free, prior and informed consent be obtained before any activities are undertaken on their traditional territories;
- natural heritage and ongoing archaeological assessment activities relevant to the cultural heritage of the Three Fires First Nations;
- cumulative emissions data;
- map and route information related to the proposed pipeline;
- the capacity to electrify the replacement compressors; and
- the impacts on CKSPFN's unceded Aboriginal Rights related to the waterways throughout its Treaty lands and traditional territory.<sup>2</sup>

EGI's delays in responding to requests for further information throughout the engagement process and delays in actually providing materials it undertook to provide to Three Fires' consultants (as noted in Three Fires interrogatories and during the technical conference) should not be used as the basis to reduce Three Fires' claimed costs in the Proceeding. In addition, Three Fires now expects to expend considerable resources and time ensuring that EGI continues to meaningfully engage and consult with the Three Fires First Nations as it undertakes the Project within their traditional territories. Three Fires therefore respectfully submits that any review of its costs should include the context of EGI's own actions causing an overly complicated technical interrogatory and interrogatory response clarification process.

### **EGI's misleading reference to the number of participants in the Proceeding**

In its Letter, EGI appears to criticize the number of individuals who supported Three Fires' participation in the Proceeding. The Letter does not contain any comment on Three Fires' effective delegation of responsibility to more junior lawyers for the bulk of work in the Proceeding, nor does it comment on the need for the support of consultants as a result of EGI's shortcomings with respect to consultations.

Three Fires acknowledges that the Board's Procedural Order No. 1 (**PO1**), provides that OEB will not generally allow the recovery of costs for the attendance of more than one representative of any party, unless a compelling reason is provided when cost claims are filed. Three Fires questions the substance of EGI's specific objection to the number of participants as it relates to its cost claim and the usefulness of it to the Board in its consideration of Three Fires'

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<sup>2</sup> See EB-2022-0086, Interrogatories from CKSPFN to EGI, Appendix A.

submissions regarding its costs. Accordingly, Three Fires respectfully requests that the Board fully disregard EGI's objection and/or concern with the number of participants in the Proceeding.

The Board's direction in PO1 is clearly meant to refer to attendance at the technical conference and not the participation of representatives in any other aspect of the Proceeding – one cannot “attend” on submissions, conducting technical reviews, or preparing interrogatories. Three Fires has not claimed costs for the attendance of six representatives and firmly rejects EGI's apparent implication that participation in the Proceeding is limited to one representative. In total, there were three representatives who attended and participated in the technical conference, as provided in Three Fires cost claim submitted to the Board. Specifically, one lawyer and one consultant attended on both Days 1 and 2, with both individuals asking questions. In addition, a second-year lawyer attended for less than five hours on Day 2 primarily in order to provide support with documents.

Three Fires required both legal counsel and its consultants available owing to the varied interests and need for clarification on legal and technical issues related to, among others, EGI's Indigenous consultation evidence report, Indigenous engagement strategies and policies, and cumulative effects assessment. In addition, legal counsel's participation was focused on ensuring that issues related to the constitutional duty to consult and accommodate, adherence to Enbridge's Indigenous Peoples Policy, and the United Nations Declaration on the Rights of Indigenous Peoples were adequately considered and put to EGI for clarification and comment. Three Fires submits that the number of attendees at the technical conference is wholly supported by the complexity and breadth of knowledge required to fully and adequately advance the interest of the Three Fires First Nations.

### **Three Fires' interventions were cost effective and efficient**

Three Fires conducted its interventions in an efficient manner throughout the Proceeding, particularly with respect to delegation of duties. Three Fires submits that, to the extent possible, it delegated work to professionals with the relevant expertise and appropriate level of experience required to complete tasks at the most cost-effective rates in accordance with the Board's intervenor cost award tariff. Three Fires respectfully submits that the Board benefitted from a broader understanding of the impacts of the project on EGI's Indigenous customers, the need for early consultation with potentially impacted First Nations, and the specific concerns of each of the Three Fires First Nations.

Three Fires notes that its consultants were integral to providing the necessary feedback and contributions to the preparation of interrogatories and subsequent clarification questions during the technical conference and requests for undertakings. The consultants provided invaluable support for advancing the interests of the Three Fires First Nations in protecting their respective Aboriginal and treaty rights. In addition, the consultants worked diligently to provide the Board with much needed context regarding the various concerns that the Three Fires First Nations have maintained throughout the entire engagement process with EGI. This work was continued in the technical conference, where Three Fires explicitly questioned EGI and its representatives on deficiencies in materials and information provided to the Three Fires First Nations.

Three Fires further notes that it pursued a cost-effective approach to delegating work to its legal counsel for its intervention and specifically notes that the bulk of the work for the technical conference was done by a second-year call overseen by a fifth-year call. In addition, Three Fires' submissions were primarily prepared cost-effectively by a second-year call. Three Fires therefore submits that this ensured that its interventions were highly focused, minimized the

need for further clarification and undertaking responses from EGI, and, most importantly, were respectful of the Board's timelines, directions, and approach to cost containment.

Three Fires is aware of the need to ensure proceedings are conducted cost-effectively so as not to overly burden ratepayers, including EGI's Indigenous customers. Three Fires' claimed costs are commensurate with the difficulty of combining the interests and concerns of two separate First Nations and that this should not be used to limit a full recovery of its costs. Three Fires respectfully submits that it should not be unfairly penalized for clearly reducing the costs of the Three Fires First Nations by combining their interventions and effectively eliminating unnecessary duplication, overlap, and expense.

## **Conclusion**

Indigenous participation in all OEB proceedings continues to be significantly limited. Three Fires is concerned that a cost decision limiting the full recovery of the sole Indigenous intervenor's costs could discourage future First Nations and other potential Indigenous intervenors from pursuing the full range of concerns identified as significant to the individuals living in Indigenous communities, even when it is a proponent's failure to comply with its duty to consult that contributes to a need for greater efforts as part of any effective representation. The risk of such a chilling effect on Indigenous participation will be even more pronounced if EGI is effectively allowed to escape responsibility for the natural consequences that its shortcomings on consultations have produced for the purposes of these proceedings.

For the foregoing reasons, Three Fires respectfully suggests that EGI reconsider and withdraw its objection to Three Fires' cost claim and requests that the Board award Three Fires 100% of its eligible costs in the Proceeding.

Sincerely,



Lisa (Elisabeth) DeMarco

- c. Adam Stiers, Manager, Regulatory Applications, EGI
- Tania Persad, EGI
- Charles Keizer, Torys LLP
- Philip Lee, Three Fires
- Chief Mary Duckworth, Caldwell First Nation
- Larry Sault, Caldwell First Nation
- Don Richardson, Three Fires