ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an Application made by Hydro One Networks Inc. ("**Hydro One**") pursuant to s. 92 of the *Ontario Energy Board Act, 1998* (the "**Act**") for an Order or Orders granting leave to construct transmission facilities (the "**Project**") in the northwest Ontario regions of Thunder Bay, Rainy River and Kenora.

AND IN THE MATTER OF an Application by Hydro One pursuant to s. 97 of the Act for an Order granting approval of the forms of land use agreements offered or to be offered to affected landowners.

SUBMISSIONS OF THE MÉTIS NATION OF ONTARIO (ON BEHALF OF THE NORTHWESTERN ONTARIO MÉTIS COMMUNITY AND THE MÉTIS NATION OF ONTARIO REGION 2)

February 21, 2024

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A. OVERVIEW

1. The Project crosses the traditional territories of the Northwestern Ontario Métis Community ("**NWOMC**") and the Northern Lake Superior Métis Community ("**MNO Region 2**") – two distinct, regional rights-bearing Métis communities that are a part of the Métis Nation of Ontario (the "**MNO**"). Pursuant to Procedural Order No. 1, the Ontario Energy Board (the "**OEB**") granted intervenor status to the MNO in this Application.[1]

2. Hydro One is obliged to obtain all necessary non-OEB approvals, permits, licenses, certificates, agreements, and rights in relation to the Project.[2] This has not occurred and there is significant doubt as to when, and on what terms, at least some of those approvals will be obtained.

3. Most relevant to this Application pertains to the Project's Environmental Assessment (the "**EA**") for which Hydro One has yet to obtain final approval. On February 2, 2024, the MNO filed lengthy submissions with the Ministry of the Environment, Conservation, and Parks (the "**MECP**") regarding numerous deficiencies and outstanding issues regarding the Final EA (the "**EA Submissions**"), particularly as they relate to Hydro One's failure to properly, and fully, discharge its consultation obligations with the MNO. A copy of the EA Submissions, which were due and filed following the evidentiary phase of this Application, is attached hereto as **Appendix A**.

4. The MNO submitted various written interrogatories to Hydro One seeking clarity on a number of (still) unknown issues relating to this Application.[3] Hydro One refused many of these requests on the basis of supposed irrelevancy.[4] In various instances, Hydro One expressly

[1] OEB Procedural Order No. 1 dated November 10, 2023 (EB-2023-0198).
[2] *Ibid* and Chapter 4 Filing Requirements for Electricity Transmission Applications, 4.2.2 Related Approvals, pages 11-12.
[3] Interrogatories of the MNO to Hydro One filed December 5, 2023 (EB-2023-0198).
[4] Hydro One Interrogatory Responses to Intervenors filed December 19, 2023, Tab 4 (EB-2013-0198).

deferred to the EA process as the appropriate, if not exclusive, forum where certain of these issues were properly addressed.[5] Many questions have been accordingly left unanswered.

5. The MNO disagrees that its requests were irrelevant to this Application or that the underlying substance of those requests could only be properly addressed in the EA process. To that end, on January 25, 2024, the MNO, through legal counsel, filed with the OEB a letter stating that the MNO may bring a motion to compel Hydro One to answer interrogatories that had been improperly refused (either in whole or in part).[6] In the meantime, however, the OEB issued Procedural Order No. 4 on February 2, 2024 setting out the submissions schedule without reference to this January 25, 2024 letter or the matters raised therein.[7]

6. In any event, rather than bring a motion to address these matters, the MNO is filing the EA Submissions in this Application to ensure that the OEB has proper context when deciding whether to approve this Application. The EA Submissions are particularly relevant in this Application given the overlapping issues in both contexts as well as Hydro One's explicit reliance on the EA process to ground its position in refusing to answer the MNO's various interrogatory requests.

7. As more fully particularized in the EA Submissions, Hydro One's preferred route for the Project carries with it the highest potential for adverse impacts to NWOMC and MNO Region 2, as well as the Métis rights-holders who are members of those communities. Hydro One's position regarding the relevant issues in this Application (as articulated in both its interrogatory responses

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[5] See, for instance, Hydro One Responses to MNO Interrogatories 1, 2, 6, and 8 (EB-2013-0198).
[6] MNO letter to OEB dated January 25, 2024 (EB-2013-0198).
[7] OEB Procedural Order No. 4 dated February 2, 2024 (EB-2023-0198).

to the MNO as set out above and in its argument in-chief)[8] is overly narrow, despite the limitations of section 96(2) of the Act.[9]

8. Similarly, the MNO notes its continued disagreement with the OEB's refusal to determine whether the constitutional principle of the honour of the Crown, including the Crown's duty to consult that flows from this constitutional principle, has been engaged and discharged in the context of Leave to Construct Applications under section 92 of the Act.[10] Nevertheless, at this time, and, for the purposes of this Application, the MNO is not specifically taking issue with OEB's position in these submissions in light of the concurrent relevancy between the issues under consideration in the EA process and the factors contained in section 96(2) of the Act.

9. From the MNO's perspective, as long as the honour of the Crown, including the duty to consult are upheld and met through a regulatory process, which at the very least requires the issues, concerns, and interests to be substantively addressed, form should not trump substance. With that said, a regulatory process cannot be structured in a manner that evades the Crown's constitutional obligation to ensure the honour of the Crown is upheld and the duty to consult is met.[11] The Supreme Court of Canada in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* held in this regard (with respect to the National Energy Board) as follows:

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[8] Hydro One's Argument In-Chief ("**Hydro One AIC**") at para. 40, pg. 11 (EB-2023-0198).
[9] Section 96(2) of the Act.
[10] The MNO has previously raised this issue and objected to the OEB's approach to it in previous proceedings. In those proceedings, the MNO ultimately reached mutually agreeable negotiated arrangements with proponents that have addressed its outstanding concerns related to project impacts on Métis rights, thereby negating the efficacy of challenging the OEB's overall decision in those proceedings on this specific legal issue. See the OEB's decision in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated December 20, 2018 at pages 11 – 13. The MNO's position on this is more fully set out in its submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018. The MNO also notes that the Alberta Court of Appeal appears to have endorsed a contrary approach to what the OEB has articulated in the above-noted decision. In particular, see the concurring reasons in the result of the Honourable Justice Feehan in *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342, particularly paras. 112 and 125.
[11] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 34.

> We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. **The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights** (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).
>
> **As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it** (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).[12] **[emphasis added]**

10. In the past, the OEB has expressly held that "Indigenous consultation and environmental matters are relevant to the issues of price, reliability and quality of electricity service where they can impact the costs of and schedule for a project".[13] The Hydro One AIC agrees that these factors are relevant considerations for this Application.[14]

11. In this case, as is detailed further below and in the EA Submissions, there are various aspects of the Project that will necessarily impact prices, reliability, and/or quality of electricity. These aspects are presently uncertain, and they will not be certain unless and until the Final EA is approved.

12. The MNO's primary position is that the OEB should not approve this Application while so much remains unknown and in flux. The MNO's alternative position is that the OEB's approval of this Application ought to be expressly subject to the Final EA being approved, as well as Hydro

[12] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at paras. 36 and 37.
[13] EB-2017-0182/EB-2017-0194/EB-2017-0364 dated December 20, 2018 at pg. 13.
[14] Hydro One AIC at para. 33, pg. 11.

One obtaining all other applicable approvals necessary for the Project, after any applicable appeal routes from interested parties have been exhausted.

B. RELEVANT BACKGROUND AND CONTEXT ON THE MNO AND THE PROJECT

13. Unlike First Nations in Ontario that have had aspects of their self-government recognized through the *Indian Act*[15], Métis communities have largely lived in what the Supreme Court of Canada has referred to as a "legal lacuna" and described as follows:

> The Crown did not apply to the Métis its policy of treating with the Indians and establishing reservations and other benefits in exchange for lands. In some regions, it adopted a scrip system that accorded allotments of land to individual Métis. However, Métis communities were not given a collective reservation or land base; they did not enjoy the protections of the Indian Act or any equivalent. Although widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, the law remained blind to the unique history of the Métis and their unique needs.[16]

14. This above-noted Crown-Métis history creates a situation where the MNO cannot currently rely on a singular treaty, document or piece of federal or provincial legislation to provide complete clarity as to the history and ongoing existence of Métis communities in Ontario, including the MNO's representativity as a Métis government for its citizens and communities. As such, the MNO is providing the following background and context to explain the origins of Métis communities in Ontario as well as the MNO as a Métis government.

15. Beginning in the late 1700s, distinct Métis communities emerged in various regions surrounding the Upper Great Lakes and along the waterways and fur trade routes of what is now known as Ontario prior to Canada becoming Canada. These Métis communities developed their

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[15] *Indian Act* (R.S.C., 1985, c. I-5).
[16] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 7.

own shared customs, traditions, and collective identities that are rooted in their special Aboriginal relationship to the land, and a distinctive culture and way of life.[17]

16. In its 2003 decision *R. v. Powley* ("***Powley***"), the Supreme Court of Canada recognized the ongoing existence of the Sault Ste. Marie Métis community as a part of the Upper Great Lakes Métis, and confirmed that this Métis community holds a Métis right to harvest for food that is protected as an Aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.[18] *Powley* was — and remains — the Supreme Court's only consideration of the s. 35 rights of the Métis as a distinct Indigenous people.

17. Today, the Sault Ste. Marie Métis community, along with other Métis communities, continue to exist in some parts of Ontario (*i.e.* in northern Ontario and surrounding portions of the Upper Great Lakes). In 1993, the members of these Métis communities, along with other Métis living in the province, created the MNO — as a Métis government — to represent their collective aspirations, rights, and interests. The foundational aims and objectives of the MNO are set out in its Statement of Prime Purpose, including to: "ensure that Métis can exercise their Aboriginal and Treaty rights," "protect and preserve the land and waters within our homelands for future generations," and "develop prosperity and economic self-sufficiency," among other things.[19]

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[17] MNO Intervention Form dated September 25, 2023 at pg. 2 in reference the 2019 and 2023 MNO-Canada self-government agreements: MNO-Canada Métis Government Recognition and Self-Government Agreement (2019) at preamble (pg. 1); MNO-Canada Métis Self-Government Recognition and Implementation Agreement (2023) at preamble (clause E, pg. 1), Appendix (pg. 44). See also EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 19 (pg. 10) in reference to the MNO-Ontario harvesting agreement: MNO-Ontario Framework Agreement on Métis Harvesting (2018) at preamble (pg. 1).

[18] *R v Powley*, [2003] 2 SCR 207 at para. 53.

[19] MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 11 (pg. 6). See also MNO Intervention Form dated September 25, 2023 at pg. 1 in reference to the MNO statement of Prime Purpose at pg. 2.

18. Based on the authorization and mandate it receives from its registered citizens — through its objectively verifiable, centralized registry that identifies Métis rights-holders — and the rights-bearing Métis communities that are comprised of those citizens, the MNO has established democratic governance structures at the provincial, regional, and local levels, consisting of the Provisional Council of the Métis Nation of Ontario ("**PCMNO**"), nine (9) MNO Regional Councillors (who sit on the PCMNO) and Regional Consultation Committees, and approximately thirty-one (31) Chartered Métis Community Councils, respectively. In particular, the MNO's Regional Consultation Committees are made up of the elected PCMNO Regional Councillor, MNO Chartered Community Council Presidents, and Captain of the Hunt for a given region, who are responsible for overseeing consultation activities within that region as set out in the MNO Consultation Protocols. These governance structures work together to advance and protect the collective rights, interests, and claims of MNO citizens and the communities it represents, including for the purposes of Crown consultation.[20]

19. In 2015, the MNO's unique self-government was recognized by the Ontario legislature in the *Métis Nation of Ontario Secretariat Act*, 2015.[21] More recently, the MNO and its unique self-government has been recognized — as a Métis government — by Canada through the *MNO-Canada Self-Government Recognition and Implementation Agreement*.[22] In addition, Parliament

[20] MNO Intervention Form dated September 25, 2023 at pg. 1 (in reference to the MNO registry), pg. 2 (in reference to the MNO's governance structures, including the Regional Consultation Committees whose Consultation Protocols are available on the MNO's website; and the 2023 self-government agreement: MNO-Canada Métis Self-Government Recognition and Implementation Agreement (2023) at ss. 6.06 – 6.07 (pg. 16 – 17)). See also MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 11 (pg. 6).
[21] *Métis Nation of Ontario Secretariat Act, 2015*, S.O. 2015, c. 39.
[22] See MNO-Canada Métis Self-Government Recognition and Implementation Agreement (2023) referred to in the MNO Intervention Form dated September 25, 2023 at pg. 2.

is currently considering the *Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan and Métis Self-Government Act*, which includes the MNO.[23]

20. With respect to the recognition of specific rights-bearing Métis communities in Ontario, in 2017, the MNO and Ontario jointly announced the identification of six historic Métis communities in Ontario, in addition to the Métis community recognized by the Supreme Court of Canada in *Powley* as set out above.[24] Relevant to the Project are the Rainy River / Lake of the Woods Historic Métis Community and the Northern Lake Superior Historic Métis Community, which the joint announcement describes as follows:

> Rainy River / Lake of the Woods Historic Métis Community:
>
> - The inter-connected historic Métis populations in and around: Lac La Pluie (Fort Frances); Rat Portage (Kenora), Eagle Lake (Dryden/Wabigoon) and Hungry Hall (Rainy River). The Lake of the Woods area includes Rat Portage, White Fish Lake, Northwest Angle, Wabigoon and Long Sault.
>
> Northern Lake Superior Historic Métis Community
>
> - The inter-connected historic Métis populations north of Lake Superior, including the Métis people who worked for period of time or settled at: Michipicoten, Pic River, Fort William, Nipigon House and Long Lake.[25]

21. These two Métis communities — the Rainy River / Lake of the Woods Métis Community and the Northern Lake Superior Métis Community — continue to exist today and are represented by the NWOMC and the MNO Region 2 (as the authorized representatives of the successors to these two historic Métis communities).[26] There is no dispute that the Project crosses the traditional

[23]A copy of the *Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan and Métis Self-Government Act*, along with the status of this Bill, is available at: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-53/second-reading.
[24] MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 15 (pg. 8) in reference to the MNO-Ontario joint announcement: "Identification of Historic Métis Communities in Ontario" and "Ontario and the Métis Nation of Ontario Announce Identification of Six Additional Historic Métis Communities".
[25] MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 15 (pg. 8) in reference to the MNO-Ontario joint announcement: "Identification of Historic Métis Communities in Ontario".
[26] EA Submissions at pg. 1.

territories of these two Métis communities, including where they assert and exercise constitutionally-protected Aboriginal rights and — in the case of the NWOMC — Aboriginal and Treaty rights pursuant to the *Constitution Act, 1982*.[27] These rights include, but are not limited to: hunting, fishing, trapping, gathering, sugaring, wood harvesting, use of sacred and communal sites, and use of water within each Métis community's respective traditional territory.[28]

22. In 2018, the MNO and Ontario signed an updated harvesting agreement accommodating Métis section 35 harvesting rights in Ontario, including in the traditional territories of the Rainy River / Lake of the Woods Métis Community and the Northern Lake Superior Métis Community (as represented by the NWOMC and the MNO Region 2).[29] As noted above, the MNO has also signed self-government agreements with Canada recognizing the MNO's governance structures and the constitutionally-protected inherent right to self-government and self-determination of the Métis collectivity it is authorized to represent.[30]

23. The Project's stated purpose is to enable industrial and resource development in northwestern Ontario. The Project will (if approved) have both direct and immediate impacts, as well as generational and cumulative impacts on the section 35 rights, interests, and way of life of the above-noted Métis communities as represented by the NWOMC and the MNO Region 2.[31] The EA Submissions detail six overarching deficiencies with the Final EA, many of which are

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[27] EA Submissions at pg. 2. See also Part II of the *Constitution Act, 1982*.
[28] MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 13 (pg. 7).
[29] MNO submissions filed in EB-2017-0182/EB-2017-0194/EB-2017-0364 dated October 31, 2018 at para. 19 (pg. 10) in reference to the MNO-Ontario harvesting agreement: MNO-Ontario Framework Agreement on Métis Harvesting (2018) at ss. 1, 3 – 4 (pg. 4 – 5).
[30] MNO Intervention Form dated September 25, 2023 at pg. 2 in reference the 2019 and 2023 MNO-Canada self-government agreements: MNO-Canada Métis Government Recognition and Self-Government Agreement (2019) at s.3.01 (pg. 7); MNO-Canada Métis Self-Government Recognition and Implementation Agreement (2023) at ss. 6.03, 6.07 (pg. 16 – 17).
[31] EA Submissions at pg. 2 and Part II of the *Constitution Act, 1982*.

relevant for the purposes of this Application as they will invariably impact the prices, reliability, and quality of electricity service of the Project.

C. KEY OUTSTANDING ISSUES FROM THE FINAL EA

24. Hydro One selected the preferred route of the Project with the highest potential for adverse impacts to the above-noted Métis communities and Métis rights-holders who are MNO citizens. As set out in the EA Submissions, this has caused significant concern, particularly given the lack of meaningful consultation with the MNO.

25. For instance, the selected route of the Project includes the largest area of conservation reserves, the greatest number of watercourses, waterbodies, and trails, and the largest area of archaeological potential and significant wildlife habitat. The MNO also has concerns regarding decreases in available Crown land to support the exercise of Métis traditional practises. Further, there was a failure to explicitly include consideration of Indigenous rights and interests to define the most favourable Project footprint.[32]

26. Given these issues, the EA Submissions detail the further, and significant, engagement that is still required to be undertaking in numerous respects, including (among other things) the following:

(a) the mitigation of some of the lesser impacts (and as many impacts as possible) resulting from the selection of the preferred route;

(b) any potential refinements to the Project's footprint and incorporation of site-specific mitigation to avoid or minimize impacts to the affected Métis communities;

[32] EA Submissions at pgs. 4 and 5.

(c) whether the Project will result in a harmful alteration to fish habitat and how these impacts can be mitigated as well as details on involvement in monitoring and managing fish species at risk so that interest can be evaluated;

(d) the loss of coniferous forest habitat, the mitigation of impacts on Métis harvesting rights, and the development of a monitoring program to assess ecosystem change as it affects Métis harvesting rights;

(e) the Project's impacts, including noise, air quality, on wildlife populations, and discussions of mitigation and monitoring strategies; and

(f) the anticipated noise impacts of the Project and which Indigenous communities are considered a Point of Reception that will be notified of activities causing noise, and engagement on monitoring and mitigation of this impact.[33]

27. Further, the Final EA states that calcium chloride may be used along municipal roads near residences and that the application of this compound will be completed in consultation with road authorities. The MNO is concerned about the potential impact that the use of calcium chloride may have on vegetation, wildlife, fish, and fish habitat. It is unclear whether calcium chloride will be sprayed directly on roads, or where else it may be applied.[34]

28. The public comment period for the Project's Final EA closed on January 19, 2024. As noted above, the MNO filed the EA Submissions on February 2, 2024, in accordance with the extension granted by the MECP. Consistent with the *Environmental Assessment Act*, the next step in the EA process is for the MECP to prepare the Ministry review of the Final EA, taking into

[33] EA Submissions at pgs. 5 – 7.
[34] EA Submissions at pg. 8.

account the comments and submissions it received in respect of same. It is open for the Director to make a finding that the EA is deficient and provide the proponent with an opportunity to remedy the deficiencies, failing which the Minister may reject the EA. If no deficiencies are found, a public comment period on the Ministry review will be provided, and the public can provide comments on the undertaking, the EA and/or the Ministry review before the issuance of any final decision.[35]

D. Approval of Application is Premature

29. While section 96(2) of the Act only refers to the prices, reliability, and quality of electricity service as being relevant considerations for this type of application, the outstanding issues identified in EA Submissions demonstrate how some, or all, of these factors remain open to material deviation from what is presently contemplated.

30. For example, many of the deficiencies noted in EA Submissions pertain to further mitigation efforts that need to be completed by Hydro One. In other words, there are potentially further, and significant, costs that may have to be expended by Hydro One in order to obtain EA approval, which in turn will likely affect the prices of, and delivery of electricity by, the Project. Similarly, the potential use (or non-use) of calcium chloride in the Project may also impact the costs of the Project.

31. Given the myriad of issues yet to be determined in the Final EA process, there is substantial uncertainty as to both the timing of EA approval (particularly given the consultations which the MNO asserts must still be completed), the costs of the Project, and how the Project will

[35] *Environmental Assessment Act*, RSO 1990, c E.18, ss. 7(1), 7.1 (2) and (3), 7.2(2), and 9(1). See also ss. 7.2(3), 8, 9.1(1), 9.2(1) and 11(1), which provides that any person may request that the Project application or a matter that relates to it be referred to the Ontario Land Tribunal for hearing and decision or that the Minister may refer an application or a matter that relates to it to the Ontario Land Tribunal or another Tribunal for mediation, a full hearing and decision, or a partial hearing on some matters, or alternatively, defer deciding a matter that is being considered in another forum.

ultimately be completed. This Application asks the OEB to make a decision without several key factors having been fully articulated, let alone determined. It should not do so.

32. In addition, regulators — acting as the Crown — must ensure that the constitutional principle of the honour of the Crown is upheld throughout its decision making process and ensure that the duty to consult is met prior to any approval that has the potential to adversely impact Indigenous rights.[36] Given that the OEB has actual knowledge that the duty to consult has not yet been discharged in relation to the Project, and there is not presently any certainty that all of these issues can be assessed and addressed in the EA process, prudence is required to ensure the honour of the Crown is upheld within this overall process.

33. Both the OEB and Hydro One have, as noted above, already confirmed that the potential impacts of Indigenous consultation and environmental matters are relevant for this Application to the extent those matters pertain to the section 96(2) considerations. This, coupled with Hydro One's obligation to obtain all approvals for the Project pursuant to both Procedural Order No. 1 and the OEB Filing requirements, heightens the need to ensure approval of this Application is not made prematurely or while numerous factors regarding the Project's price, reliability, and quality of electricity service remain unknown.

E. Relief Sought

34. For the foregoing reasons, the MNO submits that:

(a) the OEB ought not grant approval of this Application due to its prematurity; or

[36] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at paras. 34 – 37.

(b) in the alternative, the OEB's approval of this Application ought to be expressly subject to the Final EA being approved, as well as Hydro One obtaining all other applicable approvals necessary for the Project, after any applicable appeal routes from interested parties have been exhausted.

All of which is respectfully submitted this 21st day of February 2024.

David Stevens/Patrick Copeland
Aird & Berlis LLP
Counsel for the Métis Nation of Ontario
(Northwestern Ontario Métis Community
and Métis Nation of Ontario Region 2)

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Appendix “A”

Métis Nation of Ontario
Lands, Resources and Consultations

February 02, 2024

Stephen Deneault
Project Officer,
Environmental Assessment Branch
Ministry of Environment, Conservation and Parks
135 St. Clair Avenue West,
Toronto, ON M4V 1P5

VIA ELECTRONIC MAIL: Stephen.Deneault@ontario.ca

Dear Mr. Deneault,

Re: Comments on the Final Environmental Assessment for the Proposed Waasigan Transmission Line

We are writing to you, as the democratically elected Regional Councillors for the Northwestern Ontario Métis Community ("**NWOMC**") and Region 2 ("**Region 2**"),[1] to provide comments on the final environmental assessment ("**Final EA**") for the Waasigan Transmission Line Project ("**Project**") submitted by Hydro One Networks Inc. ("**Hydro One**") to the Ministry of Environment, Conservation and Parks ("**MECP**") on November 17, 2023.[2]

As outlined below, we have several ongoing and ever-increasing concerns regarding the environmental assessment process for the Project, many of which remain unresolved in the Final EA. While the NWOMC, Region 2, and Hydro One are in active discussions related to addressing some of these outstanding concerns, no formal agreement has been reached as of the date of this letter.[3]

Unless and until these concerns are addressed, it is the NWOMC and Region 2's position that the duty to consult and accommodate the NWOMC and Region 2 in relation to the Project remains unfulfilled. As such, we request that no final decisions regarding the Project be made until these concerns regarding unaddressed impacts on our Métis s. 35 rights, interests, and

[1] Please note that Region 2 is currently undertaking a democratic process regarding the region's formal name and, as such, is subject to change.

[2] Hydro One, Notice of Submission of Environmental Assessment: Waasigan Transmission Line (November 17, 2023). See email from S. Deneault (MECP) to N. Richard (November 27, 2023) granting the Métis Nation of Ontario's ("**MNO**") request for a two week extension to submit its comments on the Final EA by February 2, 2024.

[3] It is our position that deep consultation is required, and economic reconciliation related opportunities made available to First Nations must be applied equally to our Métis communities.

way of life have been addressed, mitigated, offset, or accommodated, where required. In the alternative, and as discussed below, any approval of the Project must be conditional upon the completion of future work to address these outstanding impacts.

The remainder of this letter is structured as follows:

1. Background on the Direct and Generational Impacts the Project Will Have on Métis;
2. Overview of Key Deficiencies with the Final EA; and
3. Unless and Until Project Impacts Have Been Addressed, the Duty to Consult and Accommodate Remains Unfulfilled.

Also enclosed with this letter is a memorandum prepared by MNP LLP ("**MNP**") that includes a detailed review table identifying and explaining our comments and concerns with specific parts of the Final EA. This letter, MNP's memorandum, and the detailed review table collectively constitute the NWOMC and Region 2's comments on the Final EA and must be considered together.

Background on the Direct and Generational Impacts the Project Will Have on Métis

As you know, and as is expressly acknowledged in the Final EA, the Project crosses the traditional territories of two distinct, regional rights-bearing Métis communities; namely, the NWOMC and Region 2.[4] Hydro One's selection of the preferred route with the highest potential for adverse impacts to Métis citizens—without meaningful consultation with Métis citizens—effectively "locked in" potential harms to our s. 35 rights, interests, and way of life. We no longer have the ability to avoid or minimize impacts. Instead, we are forced to attempt to reduce their severity through mitigation or accommodation measures. The history of this problematic route selection process has been well documented in the record.[5]

Given the stated purpose of the Project to enable industrial and resource development in northwestern Ontario, the Project will (if approved) have both direct and immediate impacts as well as generational and cumulative impacts on the s. 35 rights, interests, and way of life of the NWOMC and Region 2.[6]

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[4] Hydro One, Final EA (November 2023) at i. For more information on these communities, see: Northwestern Ontario Métis Community and Northern Lake Superior Métis Community: Traditional Knowledge and Land Use Study for the Waasigan Transmission Line Project (April 2023) at s.1.1 ["**TKLUS**"] and Letter from T. Stenlund (NWOMC) and T. Sinclair (Region 2) to Hon. J. Turek (MECP) (January 18, 2021).

[5] For example, see: TKLUS and letters from T. Stenlund (NWOMC) and T. Sinclair (Region 2) to M. Jackson (Hydro One) dated February 27, 2023; April 24, 2023; June 29, 2023; August 3, 2023; December 1, 2023. Concerns were also raised during an Open House in January 2023 and in meetings in June and August 2023.

[6] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.,* 2017 SCC 41, [2017] 1 SCR 1099 at para 42 ["***Chippewas***"]: "it may be impossible to understand the seriousness of the impact of a

Notably, these impacts include, but are not limited to: Land Used in the exercise of Métis s. 35 rights (certain), Preferences (likely), Important Vegetation and Wildlife Species (likely), Harvesting Timing Windows and Seasonality (possible), Intergenerational Learning (certain), Connection to Land and Sense of Place (certain), and Métis Practices (certain). The NWOMC and Region 2 have been clear that mitigation or accommodation measures for the Project are required, and "where robust mitigation strategies are not applied the severity of these identified impacts may be deemed to be high."[7] As explained below and in the enclosed, many of these Project impacts remain outstanding in the Final EA.

Overview of Key Deficiencies with the Final EA

As outlined in MNP's memorandum, the Final EA only addresses approximately 69 of our 200 comments on the draft environmental assessment ("**Draft EA**"). The remainder of our comments remain unresolved (28 comments), partially addressed (23 comments), or were punted to future engagement for which necessary details about timelines and capacity funding have not been provided (89 comments). We also identified 12 new comments based on new information in the Final EA.[8]

We have identified the following six overarching deficiencies with the Final EA:

1. All Adverse Impacts Associated with the Preferred Route Cannot be Mitigated and Offsetting Will be Required;
2. Further Consultation and Engagement is Required;
3. An Alternative to Calcium Chloride Should be Utilized;
4. The TKLUS has not Been Captured in the Final EA and Further Engagement is Required;
5. Affected Métis Communities Must be Properly Referenced and Identified in the Final EA; and
6. Business Rights Should be Addressed as Part of the Final EA, Not After.

Each of these overarching concerns, including our proposed recommendations to MECP on how best to move forward (e.g., through potential approval conditions), is further discussed below.

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project on s. 35 rights without considering the larger context…Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult."

[7] TKLUS at s. 1.

[8] Please note, some comments were identified in two categories (e.g., both partially addressed, yet pending future review/engagement, etc.). For more information, see the enclosed memorandum and detailed review table.

1. ***All Adverse Impacts Associated with the Preferred Route Cannot be Mitigated and Offsetting Will be Required***

There is a fundamental flaw with the selection of the preferred route: Hydro One selected the preferred route with the highest potential for adverse impacts to Métis citizens, without meaningful consultation with the NWOMC and Region 2.

The Terms of Reference ("**ToR**") stated that:

> Hydro One will ensure that Indigenous communities are consulted and have the opportunity to share IK to be considered and incorporated into each EA decision-making milestone including, but not limited to, the following:
>
> - The effects assessment of the preferred route and other project components, including the development of design refinements, mitigation measures and monitoring to address any potential effects and conclusions of the assessment.

It is the position of the NWOMC and Region 2 that this was not done.

As noted above, the NWOMC and Region 2 have been clear throughout the entire engagement process that we have significant concerns with the preferred route selected by Hydro One. These concerns were explicitly raised in our comments on the Draft EA and include:

- the fact that the selected route includes the largest area of conservation reserves; the greatest number of watercourses, waterbodies, and trails; and the largest area of archaeological potential and significant wildlife habitat;
- concerns around decreases in available Crown land to support the exercise of Métis traditional practises; and
- a failure to explicitly include consideration of Indigenous rights and interests to define the most favourable Project footprint.

These concerns have not been addressed in the Final EA.

In addition, the NWOMC and Region 2 take the position that the site-specific nature of the mitigation measures proposed by Hydro One cannot avoid the adverse impacts of the preferred route given the regional nature of our s. 35 Métis rights, interests, and way of life that may require targeted mitigation. Mitigation development may be possible to minimize lesser impacts. The NWOMC and Region 2 remain interested in on-going engagement to determine if mitigation and minimization of some impacts, particularly the lesser impacts, is possible.

Notwithstanding this willingness to engage in further discussions with the goal of achieving mitigation of some impacts, in the NWOMC's and Region 2's view, the development of offsetting will be required to address other impacts that cannot be mitigated. Further to this, the NWOMC

and Region 2 are eager to set out a framework and timeline to discuss offsetting in greater detail.

Recommendation for MECP:

It is the position of the NWOMC and Region 2 that Hydro One has not fulfilled a key requirement of the ToR, has failed to consult us on the preferred route, and has failed to consider and incorporate Métis traditional practices and knowledge into the decision on the preferred route.

It is therefore requested that the MECP declare that the route selection process was deficient and direct further engagement and consultation on the preferred route in recognition that this route creates impacts on Métis rights, interests, and way of life that cannot be addressed through micro-mitigation.

In the alternative, in recognition of this deficiency, it is requested that the MECP require Hydro One to set out a framework and timeline to discuss offsetting with the NWOMC and Region 2.

We note that successful engagement is also contingent on sufficient funding and proper communication. As a result, we request that any MECP direction to consult, also ensures sufficient funding will be provided and proper communication undertaken around firm timelines.

2. Further Consultation and Engagement is Required

Notwithstanding the NWOMC and Region 2's position that mitigation measures cannot fully avoid the adverse impacts of the preferred route, the NWOMC and Region 2 are interested in participating in further engagement work towards solutions for the mitigation of some of the impacts of the Project and preferred route. Further engagement is required, but not limited to the following key items:

- Mitigation of some of the lesser impacts (and as many impacts as possible) resulting from the selection of the preferred route;
- Potential refinements to the Project footprint and incorporation of site-specific mitigation to avoid or minimize impacts to the NWOMC and Region 2;
- Whether the Project will result in a harmful alteration to fish habitat and how these impacts can be mitigated as well as details on involvement in monitoring and managing fish species at risk so that interest can be evaluated;
- Plans to modify the provincial park and conservation reserve Management Plans and Statements and Project, cumulative effects, and impacts to harvesting rights. This should include further engagement with respect to impacts on historic occupation/camp/cabins, historic canoe routes, sacred/spiritual site (place of importance), and trade routes, as well as contemporary gathering sites, current canoe routes, land portages, and snow machine

routes throughout various Provincial Parks, including Quetico Provincial Park, Turtle River-White Otter Lake Provincial Park, Campus Lake Conservation Reserve, White Otter Enhanced Management Area and the Swamp River Area of Natural and Scientific Interest;

- The use of signage as a mitigation measure and inadvertent impacts on harvesting rights;
- Consultation on the Indigenous Participation Plan, which to date, has not occurred;
- The loss of coniferous forest habitat, the mitigation of impacts on harvesting rights, and the development of a monitoring program to assess ecosystem change as it affects harvesting rights;
- Involvement in monitoring programs and the plan for restoration of disturbed areas and ecosystems;
- Ensure species of importance to the NWOMC and Region 2 are properly represented by the representative criteria species for assessing impacts to wildlife and wildlife habitat;
- Engagement on Project impacts, including noise, air quality, on wildlife populations, and discussions of mitigation and monitoring strategies;
- Consultation on burning of slash schedules and involvement in mitigation and monitoring plans related to this activity;
- Consultation on, and involvement in, all monitoring programs intended to address or mitigate adverse impacts of the Project;
- Anticipated noise impacts and which Indigenous communities are considered a Point of Reception that will be notified of activities causing noise, and engagement on monitoring and mitigation of this impact;
- Consultation on the selection of criteria and indicators that will be used to ensure that the NWOMC and Region 2 perspective and rights are captured and reflected;
- The mitigation measures in the Project Environmental Protection Plan ("**EPP**"). There are several subject matter plans within the EPP umbrella, all of which require detailed commitments to further engagement. These plans include:
  - Dust Control/Air Quality Plan
  - Fish and Fish Habitat Compensation Plan
  - Waste Management Plan
  - Blasting and Communication Management Plan
  - Spill and Emergency Preparedness and Response Plan
  - Contingency and Management Plans

    - Water Taking and Discharge Plan
    - Communications Plan

- With respect to the Dust Control/Air Quality Plan, a commitment is required to discussing and finding less toxic alternatives to the use of calcium chloride as a dust suppressant;

- Hydro One indicated that the Stage 2 Archaeological Assessment will not be completed and integrated in the Final EA, and committed to further engaging the NWOMC and Region 2 on the Stage 2 Archaeological Assessment and providing opportunities for involvement. However, firm timelines and funding commitments have not been provided for this further required engagement.

The NWOMC and Region 2 are concerned that a great deal of the work and mitigation of adverse impacts has been left for a later stage in the environmental assessment approval process—in particular, the majority of the use of EPPs as a method of mitigating adverse environmental impacts. As a result, we require details and firm timelines for how and when these discussions will occur. In order to achieve engagement on the matters outlined above, a Communication Protocol—which remains outstanding—needs to be developed and executed. Further, successful engagement is also contingent on sufficient funding.

Furthermore, our comments on the Draft EA stated that the NWOMC and Region 2 must also be consulted to ensure continued access to cultural values as well as recreational values such as navigational routes. This includes consultation on placement of permanent fencing and gates as these can result in unanticipated impacts to Métis harvesters and land users. In the case of fences or gates, these can increase Métis avoidance of an area by varying distances. Avoidance distances from fences and gates by NWOMC and Region 2 citizens should be explored and mitigated, where required.

The Final EA does not address the NWOMC and Region 2's request for consultation to ensure continued access to cultural values as well as recreational values, include gates and fences. This must be rectified with timely consultation, and depending on the outcome of those consultations, offsetting may be required.

Recommendation for MECP:

The NWOMC and Region 2 take the position that that the duty to consult and accommodate the NWOMC and Region 2 in relation to the Project remains unfulfilled, and we request that no final decisions regarding the Project be made until the above-noted deficiencies in consultation and engagement have been rectified and further, that impacts to our Métis s. 35 rights, interests, and way of life have been addressed, mitigated, offset, or accommodated, where required. To this end, the NWOMC and Region 2 request that the MECP require Hydro One to engage in additional consultation.

In the alternative, if the Final EA is approved, we request that the Minister include a condition requiring deep consultation and further engagement with the NWOMC and Region 2 on the development and execution of a Communication Protocol containing firm timelines, the provision of funding, and direction to Hydro One to ensure that the above-noted future engagements are effectively carried out.

3. *An Alternative to Calcium Chloride Should be Utilized*

The Final EA states that calcium chloride may be used along municipal roads near residences to reduce dust and improve safety where there is increased Project / traffic interface with public road users, and that application of calcium chloride will be completed in consultation with road authorities.

The NWOMC and Region 2 are concerned about the potential impact that the use of calcium chloride may have on vegetation, wildlife and fish, and fish habitat. It is unclear whether calcium chloride will be sprayed directly on roads, or where else it may be applied.

Hydro One has indicated that a Dust Control/Air Quality Plan will also be included as part of the EPP. Further engagement on the potential adverse impacts of calcium chloride may have on Métis rights, interests, and way of life is required, as is a discussion on potential dust control alternatives that are less toxic (e.g., water).

Recommendation for MECP:

If the EA is approved, include a condition that does not permit the use of calcium chloride as a dust suppressant or, in the alternative, requires prior consultation with the NWOMC and Region 2 on the development of the Dust Control/Air Quality Plan and EPP to ensure that less toxic alternatives are sufficiently explored and the impact on Métis rights, interests, and way of life is assessed.

4. *The TKLUS has not Been Captured in the Final EA and Further Engagement is Required*

As you know, the NWOMC and Region 2 completed the Traditional Knowledge and Land Use Study (“**TKLUS**”) for the Project that included existing condition information related to Loss of Land or Change in Priority Rights, Harvesting and Sites, and Cultural Identity.[9] The TKLUS was intended to inform Hydro One’s assessment of impacts to Métis specific criteria as well as the development of specific mitigation measures. However, it was not meant as the sole source of this information. Further engagement is required to ensure accurate characterization of net effects and development of relevant and responsive mitigation measures.

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[9] TKLUS at s. 3 (pp. 37-69).

Hydro One committed to considering Indigenous knowledge at all stages of the Project and, based on comments on the Draft EA, pledged to accurately capture this information in the Final EA. As detailed in the enclosed MNP detailed review table, in some instances, this has not been completed. For example, Hydro One's use of the concept of indicator species to assess impacts to wildlife habitat must ensure all species of importance to the NWOMC and Region 2 are properly represented by the representative criteria species. Additionally, the TKLUS appears not to have been used in the baseline characterization or effects assessment for fish and fish habitat. Further, the NWOMC and Region 2's recommendation to re-evaluate certain magnitudes based on the impact to Métis rights was not applied fully in the Final EA, with no further discussion about why some magnitude re-evaluations were completed and why others were not (with respect to Provincial Parks and Conservation Reserves).

Recommendation for MECP:

If the EA is approved, it is requested that MECP include a condition that further engagement is required to ensure a thorough assessment of significance and the implementation of collaboratively developed mitigation measures.

5. ***Affected Métis Communities Must be Properly Referenced and Identified in the Final EA***

There are references in the Final EA to the "Métis Nation of Ontario" ("**MNO**"), such as in Table 6.9-1 and Table 7.3-1, Table 7.8-1. This should be changed to reference the actual impacted regional, rights-bearing Métis communities represented by the MNO impacted by the Project—i.e., the NWOMC and Region 2.

Recommendation for MECP:

The NWOMC and Region 2 request the MECP direct Hydro One to correct these incorrect references in the Final EA.

6. ***Business Rights Should be Addressed as Part of the Final EA, Not After***

The NWOMC and Region 2 made the following comment with respect to the Draft EA:

> Hydro One lists a partnership that was formed with First Nations for this Project. The First Nations that form the partnership will either benefit from investment in the Project or apply the earnings from the investment as an accommodation measure.
>
> The NWOMC and Region 2 have not been afforded similar economic opportunity or accommodation, despite identification of Project impacts on the NWOMC and Region 2 criteria through the NWOMC and Region 2 Traditional Knowledge and Land Use Study for the Waasigan Transmission Line Project.

As noted by Hydro One on PDF page 7 of the 4.0 Engagement Summary:

"Ontario, as the Crown, has a legal obligation to consult with Indigenous peoples where it contemplates decisions or actions that may negatively affect asserted or established Indigenous or Treaty Rights. The duty to consult, and where appropriate accommodate, is rooted in:

- The Honour of the Crown (a legal principle that requires the Crown, as represented by the federal and provincial governments, to act honourably in their dealings with Indigenous communities); and
- The protection of Indigenous and Treaty Rights under Section 35 of the Constitution Act, 1982."

The NWOMC and Region 2 request further engagement with Hydro One to discuss an equitable accommodation measure, including equitable economic opportunities for Métis citizens and businesses, in relation to the Project. While we are supportive of Hydro One's stated intent to continue these discussions, timelines and milestones for continued discussion with the NWOMC and Region 2 on this matter are not included in the Final EA.

In addition, Hydro One has stated that they will offer Indigenous Businesses rights associated with aggregate pits and their reclamation. To date, we have not had discussions with Hydro One on this issue. The NWOMC and Region 2 request that Hydro One commit to providing Business Rights associated with aggregate pit reclamation.

Moreover, Hydro One indicated that the NWOMC and Region 2 were invited to participate in the Early Contractor Involvement process between March 2021 and spring 2022. The process was designed to support early engagement between two potential contractors and Indigenous communities and facilitated the contractors' learning more about the potential skills and resources available locally in Indigenous communities. Following a competitive procurement process, Valard was selected as the Project's contractor. The Final EA does not present details about Hydro One's commitment or progress on hiring Métis citizens and businesses. While Valard recently provided some high-level information about potential employment and business opportunities, that information is missing key details needed (and repeatedly requested by the NWOMC and Region 2) to enable productive conversations.

The NWOMC and Region 2 require equal business and employment opportunities as have been offered to First Nations and request that Hydro One commit to providing same.

Recommendation for MECP:

If the EA is approved, include a condition that Hydro One commit to a firm timeline for discussions of economic benefits, including business and employment opportunities, associated with the Project with the NWOMC and Region 2, as well as the provisions of sufficient capacity funding to support those discussions.

Based on the foregoing, it is evident that much work still needs to be done in order to address the Project's potential impacts on Métis s. 35 rights, interests, and way of life. Approval based on the Final EA in its current form is premature and, as discussed below, contrary to the constitutional duties and obligations owed to the NWOMC and Region 2, as distinct rights-bearing Métis communities.

Unless and Until Project Impacts Have Been Addressed, the Duty to Consult and Accommodate Remains Unfulfilled

The Courts have been clear: the "duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown," that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples," and that consultation is intended to be part of "a process of fair dealing and reconciliation" between Indigenous peoples and the Crown.[10] It must involve a process that allows for two-way dialogue[11] and be undertaken "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples."[12] In short: it must be more than "an opportunity to blow off steam."[13]

The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples."[14] The Ministry of Energy, Northern Development and Mines ("**MENDM**") delegated procedural aspects of the Crown's duty to consult on the Project to Hydro One.[15] The Courts, however, have been clear: "[t]he Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests […] the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[16]

"Good faith consultation may in turn lead to an obligation to accommodate," including implementation of those accommodation measures in order to uphold the honour of the

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[10] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511 at paras 16 & 32 ["***Haida***"]. See also: *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 38 where the Supreme Court held that consultation is concerned with "'an ethic of ongoing relationships' and seeks to further an ongoing process of reconciliation."

[11] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3 at paras 558-559: "Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue" and "[t]he Crown is required to do more than to receive and document concerns and complaints."

[12] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168; *Haida* at para 38*; Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at paras 55 and 61 ["***Mikisew***"].

[13] *Mikisew* at para 54.

[14] *Haida* at para 45.

[15] Letter from S. Adkar (MENDM) to M. Davidson (October 30, 2018).

[16] *Haida* at para 53; *Chippewas* at para 37; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069 at para 22 ["***Clyde River***"].

Crown.[17] Meaningful consultation cannot exclude "from the outset any form of accommodation."[18] As the Courts have directed, "[w]here a strong *prima facie* case exists… and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement… Accommodation is achieved through consultation" and negotiation.[19]

As outlined above and in the enclosed, there remains a considerable amount of work still to be done to craft mutually agreeable mitigation or accommodation measures that respond to outstanding Project impacts on the NWOMC and Region 2's Métis s. 35 rights, interests, and way of life of life. While some of these concerns may ultimately be addressed through future discussions with Hydro One, no formal agreement on these issues has been reached with the Métis to date. We appreciate Hydro One's willingness to continue discussions and engagements with the Métis, but require clarity and firm commitments on future engagement timelines, capacity funding, and processes to ensure this necessary work is completed.

The Crown's duty to consult and accommodate regarding impacts of its actions or decisions is a constitutional duty and, as such, must be fulfilled **before** a project can be approved or any action taken; where it is not, the Courts have held that the action will be open to challenge and should be overturned on judicial review.[20] As such, we reiterate that our position that the duty to consult and accommodate Project impacts on the s. 35 Métis rights, interests, and way of life of the NWOMC and Region 2 has not been fulfilled.[21]

Considering the above, we request that no final decision be made about the Project until these issues have been addressed through mutually agreed upon mitigation or accommodation measures. In the alternative, and as specified above, any approval of the Project must be conditional upon the completion of future work needed to address these outstanding impacts. We believe these requests are necessary to ensure the honour of the Crown is upheld in the current situation and in order for the Crown to meet its consultation and accommodation obligations owing to the NWOMC and Region 2 in relation to the Project.[22]

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[17] *Haida* at paras 10 & 47.

[18] *Mikisew* at para 54.

[19] *Haida* at para 47.

[20] *Clyde River* at para 24: "Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review."

[21] This is consistent with our prior positions. For example, see: Letter from T. Stenlund (NWOMC) and T. Sinclair (Region 2) to M. Jackson (Hydro One) (August 3, 2023; December 1, 2023).

[22] *Clyde River* at para 22: "Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty," which

We appreciate your consideration of our comments on the Project's Final EA. Should you have any questions or concerns regarding the above or enclosed, please contact Bonnie Bartlett at BonnieB@Metisnation.org or 1-(705)-740-4364.

Sincerely,

Theresa Stenlund	Tim Sinclair
Regional Councillor for the Northwestern Ontario Métis Community & Chair of the Treaty #3/Lake of the Woods/Lac Seul/Rainy Lake and Rainy River Consultation Committee	Regional Councillor, Region 2 Provisional Council of the Métis Nation of Ontario Councillor and Chair of the Region 2 Consultation Committee

Encl. MNP LLP Memorandum, including Appendix A (January 16, 2024)

cc Region 1 Consultation Committee Members:
Marlene Davidson, President of Atikokan Métis Council
Liz Boucha, President of Kenora Métis Council
Deanna Parker, President of Northwest Métis Council
Brady Hupet, President of Sunset Country Métis Council
Sandy Triskle, Captain of the Hunt, Region 1

Region 2 Consultation Committee Members:
Wendy Houston, President of Thunder Bay & District Métis Council
Trent Desaulniers, President of Superior North Shore Métis Council
Sandra Gillis, President of Greenstone Métis Council
Grant Robbins, Captain of the Hunt, Region 2

MNO Lands, Resources and Consultations Staff:
Linda Norheim, Director
Bonnie Bartlett, Manager
Nicholas Richard, Consultation Advisor, Region 2

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may include "seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered."

Hydro One Networks, Inc.:

Penny Favel, Vice-President, Indigenous Relations
Matthew Jackson, Director, Indigenous Relations
Stephanie Ash, Manager, Indigenous Relations