

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

BETWEEN:

BAMKUSHWADA LIMITED PARTNERSHIP (“BLP”) and
FORT WILLIAM FIRST NATION,
RED ROCK INDIAN BAND,
PAYS PLAT FIRST NATION,
BIIGTIGONG NISHNAABEG (aka Ojibways of the Pic River First Nation),
PIC MOBERT FIRST NATION and
MICHIPICOTEN FIRST NATION
(ALL APPELLANTS TOGETHER BEING THE “BLP FIRST NATIONS”)

Appellants

- and -

THE ONTARIO ENERGY BOARD and HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF ONTARIO as represented by THE MINISTER OF ENERGY,
NORTHERN DEVELOPMENT AND MINES

Respondents

NOTICE OF APPEAL

THE APPELLANTS BLP FIRST NATIONS APPEAL to the Divisional Court from the Decision and Order of the Ontario Energy Board (“OEB”) dated December 20, 2018 (the “Decision”).

THE APPELLANTS ASK that the Decision be set aside and judgment be granted as follows:

1. An Order:
 - (a) Allowing BLP First Nations’ appeal;
 - (b) Setting aside the Property Transfer Condition;

- (c) Setting aside the Disallowance Order and directing the OEB to permit recovery of the Disallowed Costs by Upper Canada Transmission Inc (“UCT” or “NextBridge”);
- (d) Setting aside the NTE Order and directing the OEB to consider whether the Duty to Consult and Accommodate (“the Duty”), the Honour of the Crown and/or Section 35 Values have been upheld in favour of the BLP First Nations in respect of Leave to Construct applications:
 - (i) either as part of the consideration in section 96(2) of the Act, of reliability and quality of service, and/or price, and effects on any of these from failures to uphold or meet these requirements prior to the award of Leave to Construct; or
 - (ii) apart from and in addition to the considerations in section 96(2) of the Act;
- (e) That the OEB made an error of law, or in the alternative, exceeded its jurisdiction, by failing to consider, in making the Decision, whether the Duty and Honour of the Crown and the Duty had been upheld;
- (f) That the OEB made an error of law, or in the alternative, exceeded its jurisdiction, by failing to consider and apply Section 35 Values in making the Decision;
- (g) That the OEB made an error of law, or in the alternative, exceeded its jurisdiction, in interfering with and hampering the discharge of the Duty including through incentivizing as little money and time as possible being spent on it;
- (h) That the Decision is unconstitutional by virtue of the failure of the OEB to discharge the Duty or the failure of the OEB to consider whether the Duty, the Honour of the Crown and/or Section 35 Values had been upheld;

- (i) In the alternative to 1(g), that the *Ontario Energy Board Act* (the “Act”) is unconstitutional insofar as it purports to exclude from the OEB’s jurisdiction the obligation to meet or to consider whether the Duty, the Honour of the Crown and/or Section 35 Values had been met by the Crown or those to whom the Duty had been delegated;
- (j) That this Appeal be heard together with the Appeal from the Decision brought by Upper Canada Transmission Inc (on behalf of Nextbridge).

THE GROUNDS OF APPEAL

Overview

2. A major new transmission line in northwestern Ontario, to run more or less from Wawa to Thunder Bay (“Transmission Project”), was approved by the Ontario Government in its Long Term Energy Plan in or about 2010. The Independent Electricity Systems Operator (“IESO”) and the Ontario Government, in or about June 2011 confirmed the necessity and priority for this Transmission Project. The IESO’s updated assessment in December 2017 confirmed that it ought to be in service by 2020.

3. The Ontario Government in or about 1999 established a new process before the OEB to determine which entity would have the right to develop, construct and operate this Transmission Project. That process provided for competitive bids to be submitted by entities/companies for the right to develop the Project. That was the stage at which a “Designated Transmitter” to carry out development work would be selected by the OEB. The OEB made such selection in respect of the Transmission Project in 2012, and awarded this leave to develop to NextBridge. Development includes carrying out the Duty and ensuring that economic partnership is made available to affected indigenous parties, carrying out environmental assessments, and essentially doing all things necessary prior to and as a condition of commencing construction.

4. After receiving leave to develop, NextBridge carried out the Duty with the Appellants and negotiated with and concluded agreements with BLP for significant economic participation in NextBridge’s proposed Transmission Project, the East West

Tie Line (“EWT”). Such economic participation and related Accommodation measures include ownership in the EWT and priority opportunities for hundreds of jobs and millions of dollars in business contracting. BLP will become formal partners with NextBridge on commencement of operations (at the conclusion of construction).

5. When NextBridge, working with BLP, had concluded all of the development work, it submitted its application to the OEB for Leave to Construct, on or about July 31, 2017.

6. Several months later, very late in the entire process, Hydro One Networks Inc. (“HONI”) submitted a competing application for Leave to Construct, on or about February 15, 2018. It calls its Transmission Project the Lake Superior Link (“LSL”). HONI’s LSL would mirror much of the route that NextBridge’s EWT would, except that the LSL would go through Pukaskwa National Park which is subject to aboriginal title claims by two of the Appellant First Nations (Pic Mobert First Nation and Biigtigong Nishnaabeg).

7. HONI had not, when it submitted its Leave to Construct application, and to date has still not, fulfilled or carried out much of its delegated obligation to meet the Duty to the Appellants or to negotiate and provide economic participation to BLP, or the environmental assessments.

8. Despite all this, the OEB entertained HONI’s wholly incomplete competing application (in that HONI applied before any Duty had been carried out and before much other development work had been done) and in its Decision the OEB reduced everything that should be considered at Leave to Construct, to nothing more than the lowest price printed on a piece of paper by each applicant. In the Decision, the OEB ordered the two applicants (NextBridge and HONI) to submit a Not-to-Exceed final price for construction of the Transmission Project and determined that the applicant with the lowest such price will be awarded Leave to Construct (the “NTE Order”).

9. The NTE Order and the Decision in general are wrong in law and defile the purpose of Section 35 of the Constitution being reconciliation of Aboriginal Peoples and

their rights with the asserted sovereignty of the Crown in the context of a long and continuing imposition of colonialism in Canada. The NTE Order and the Decision make a mockery of the Duty, the Honour of the Crown and Section 35 Values.

10. The NTE Order incentivizes applicants and proponents (in this case, HONI) to spend the least amount of money and time on carrying out the Duty as they think they can get away with, forcing First Nations to fight to have this Duty met and setting this all up for a challenge by First Nations just prior to construction when it is clear the Duty has not been met by then. This creates a process that puts First Nations at a disadvantage from the outset, is likely to fail First Nations and the Constitution, and end up in adversarial litigation. This is not in keeping with the Honour of the Crown or Section 35 Values.

11. The Appellants plead and rely on the facts and grounds of appeal set out in the Notice of Appeal filed by NextBridge in respect of the Decision, namely the OEB order or condition therein that NextBridge must transfer its provincial environmental assessment materials to HONI including as a condition of receiving reimbursement for its submitted development costs (the “Property Transfer Condition”) and the order granting only about two-thirds of NextBridge’s submitted development costs and disallowing the rest (the “Disallowance Order”).

Grounds in Detail

12. The Appellants are First Nations, except for BLP which is a limited partnership made up of the Appellant First Nations. BLP was formed to negotiate Accommodation (pursuant to the Duty) including economic participation (pursuant to the Minister of Energy’s direction on 2013) in whatever transmission project was awarded leave to develop the line.

13. Each of the First Nations has the capacity of a Band within the meaning of the *Indian Act*, is an Aboriginal People within the meaning of the *Constitution Act, 1982*, and is an Indigenous People within the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples*.

14. The Appellant First Nations each have Reserves and/or traditional territories which will be impacted by the Transmission Project.

15. It is not contested that each of the Appellant First Nations is owed the Duty with respect to the Transmission Project, and the impacts which such Project is expected to have on their respective Aboriginal and Treaty Rights and interests. The Crown in Right of Ontario delegated the Duty to Nextbridge and HONI.

16. As the “Designated Transmitter” given leave to develop the Transmission Project, Nextbridge had to conduct an environmental assessment, and it did so. It also had to discharge the Duty, which it did. Nextbridge completed all of these requirements prior to seeking Leave to Construct.

17. When HONI sought Leave to Construct from the OEB for its competing Transmission Project, the LSL, it had not commenced carrying out the Duty or the required environmental assessments and has carried out little of each to date.

18. In making the Decision, the OEB paid no heed to the Duty or the Honour of the Crown or Section 35 Values, did not discharge the Duty itself, and did not consider whether the Duty, the Honour of the Crown or Section 35 Values had been upheld.

19. The Duty is owed whenever contemplated Crown conduct might affect an asserted or proven Aboriginal or Treaty right (“Rights”). It is grounded in Section 35 of the Constitution and the Honour of the Crown, and is a constitutional requirement.

20. The OEB is an agent of the Crown in Right of Ontario “and its powers may be exercised only as an agent of Her Majesty.”¹ The OEB was required to ensure that the Duty was met in respect of its Decision on or relating to Leave to Construct. The OEB may also be required to carry out that same Duty.

21. The Duty is owed commencing at the earliest possible planning stages of a project (the “strategic planning stage”) and at all stages of that same project in which a Crown decision or action is contemplated that might adversely affect Rights. While there

¹ *Ontario Energy Board Act, 1998* SO 1998, c15, Sched B [the “Act”], s 4(4).

may be further Crown decisions associated with the Transmission Project (for instance, for the environmental assessments), the Duty must be discharged in respect of each particular contemplated conduct or decision which might adversely affect Rights. As such, it must be discharged in respect of the Leave to Construct stage.

22. The OEB's Decision on Leave to Construct settles and determines certain matters associated with the Transmission Project, including the route of the Line. The Duty has to be met in respect of Leave to Construct.

23. The OEB was obligated to ensure that the Duty had been met in respect of Leave to Construct prior to making its Decision. The OEB is the only decision maker with the ability to ensure that the Duty has been met at this stage.

24. The OEB did not do so. Instead, it required as a condition of Leave to Construct approval that "the successful applicant obtain all necessary approvals, which includes EA approval, as may be required to construct the project."² This was held out by the OEB as "ensur[ing] that the adequacy of Indigenous consultation has been determined during the project approvals phase."³

25. This is an error of law by the OEB. The "project approvals phase" is not a discrete process at the end of which a single decision maker has the power to assess, consider and make a decision on all project approvals. Rather, there are a number of separate approvals, each of which decides with finality the issue under its jurisdiction. Once the OEB makes its Leave to Construct decision which contains a final decision on routing, for instance, the only way to change the route would be for the OEB to vary its decision, or make a superseding decision. Having made its decision in the absence of consultation or accommodation or consideration of same, the OEB effectively precludes consultation and accommodation on those issues.

² Decision, p 63.

³ *Ibid.*

26. The Decision to tie approval of Leave to Construct to the party which offered the lowest NTE price, that is, the lowest price ceiling for construction of the Transmission Project, is an error of law and/or exceeds the OEB's jurisdiction.

27. In effect, the OEB's NTE Order and Decision purports to be a juridical disincentive to the proper discharge of the Duty.

28. In addition to facilitating a breach of the Duty itself, the OEB's Decision makes a mockery of the Honour of the Crown. The Honour of the Crown is "not a mere incantation, but rather a core precept that finds its application in concrete practices."

29. The Honour of the Crown requires at the very minimum that the Crown not stand in the way of the discharge of the Duty. Indeed, it requires a great deal more. By deciding to award Leave to Construct to the applicant which offered the lowest NTE price, the OEB unlawfully fettered its discretion, made an error of law and exceeded its jurisdiction.

30. In making the Decision, the OEB relied on what it viewed as statutory limits to its jurisdiction when deciding to whom to award Leave to Construct. The OEB must award Leave to Construct when it is in the public interest to do so (section 92 of the Act), and in determining whether an application is the public interest, the OEB considers the factors in section 96(2) of the Act: price, and reliability and quality of electricity service (and where applicable, promotion of renewable energy sources).

31. The Duty is a Constitutional duty, and lies upstream of statute. All statutes must be read in a manner consistent with the Duty.

32. Even statutory language which purports to be comprehensive, or to set out a specifically enumerated list of considerations to the exclusion of other considerations, cannot oust the Duty unless it contains clear and specific language setting out the legislature's unequivocal intention to oust the Duty. No less of a burden would be consistent with the Honour of the Crown.

33. No such unequivocal intention to oust the Duty is present in the Act, and so the OEB must ensure that its Decision complies with section 35 of the Constitution.

34. In considering the public interest as required by section 92 of the Act, the OEB was obligated to consider whether the Duty was discharged – either as part of considering price, reliability and quality of service, or in addition to these factors. It did not do so, and as a result, the Decision is unconstitutional.

35. The Duty of the Crown to Consult and Accommodate the Appellant First Nations where their proven or asserted Aboriginal or treaty rights may be adversely affected is a constitutional duty. Any statute or decision maker which purports to allow or make decisions which might adversely affect an Aboriginal or treaty right without first consulting and accommodating the affected First Nations is by definition unconstitutional.

36. In the alternative to the foregoing, if the Act is found to explicitly restrict the OEB to only consider the factors set out in section 96(2) when making its Leave to Construct decisions, in a way that forecloses consideration of whether the Duty was met or forecloses the OEB from meeting it itself, then the Act is unconstitutional. To the extent of its unconstitutionality, the Act must be of no force or effect, and any decisions made thereunder similarly of no force or effect.

37. As is the case with the *Charter of Rights and Freedoms*, Section 35 of the Constitution contains not only its written text, but also the values which flow from that text and its underlying purpose.

38. The purpose of Section 35 is reconciliation between the Crown and Aboriginal peoples in the context of gross injustices wrought from decades of colonialism and continuing today. The mechanism for that reconciliation is the Honour of the Crown and the concrete practices flowing therefrom, most especially consultation and accommodation.

39. Canadian courts have long recognized “constitutional... values” as being “an important tool in judicial decision making”. Section 35 Values include the need for the

Crown to act honourably in all its dealings with Aboriginal peoples when impacts on their Rights are at stake, and assessment of whether and how such honourable action should be carried out in the context of reconciliation in and from a colonialist state. As with Charter Values, any exercise of statutory discretion by an administrative decision maker and agent of the Crown must comply, where relevant, with Section 35 Values. The consideration of Section 35 Values is as important as the other factors which the decision maker must consider in exercising its statutory discretion.

40. The OEB erred in law or exceeded its jurisdiction in failing to consider or apply Section 35 Values in its Decision.

41. In particular, the OEB failed to consider the ways in which the Decision would contribute to reconciliation and would be consistent with honourable action.

42. Rather, the OEB's decision specifically and explicitly ignored the concerns of the Appellant First Nations.

43. Sections 33 of the Act.

44. Section 134(1) of the *Courts of Justice Act* RSO 1990, c C43.

45. Section 35 of the *Constitution Act, 1982*.

46. Such further grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: The Decision which is the subject of this appeal is an Order within the meaning of section 33(1)(a) of the *Act* and as such, leave to appeal is not required

The appellant requests that this appeal be heard at Toronto.

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