

**ONTARIO ENERGY BOARD CASE NO. EB-2012-0451**

**IN THE MATTER OF: Enbridge Gas Distribution Inc. Application for the GTA  
Reinforcement Project**

**Written Submission of the Mississaugas of the New Credit First Nation**

**November 8, 2013**

## **I. OVERVIEW**

The Mississaugas of the New Credit First Nation (“MNCFN”) has intervened in this proceeding to safeguard its rights and interests with respect to its traditional territory.

The Enbridge Gas GTA Project runs through the traditional territory of the MNCFN. Enbridge Gas Distribution Inc. (“Enbridge”) seeks approval to build two new natural gas pipelines and associated facilities in the GTA (collectively, “The Project”).

The approval of the Project in its current form creates substantial risks to the cultural heritage and environmental resources within the MNCFN’s traditional territory.

### The Mississaugas of the New Credit First Nation

The Enbridge Gas GTA Project is taking place within the traditional territory of MNCFN.

The MNCFN wishes to protect our lands and waters, our livelihoods and way of life, and our rights from the damage that could occur if Enbridge Gas proceeds with construction of the Project.

The construction of the proposed GTA Project and related activities may destroy or harm Culturally Sensitive Sites and environmentally sensitive areas in our traditional territory. Such activities will likely have a significant negative impact on our aboriginal and treaty rights.

The MNCFN’s traditional territory commences at Long Point on Lake Erie, then eastward along the shore of Lake Erie to the Niagara River. Then down the Niagara River to Lake Ontario, then northward along the shore of Lake Ontario to the River Rouge east of Toronto, then up the River Rouge to the dividing ridge between Lakes Ontario and Simcoe, then along the dividing ridges to the head waters of the River Thames, then southward to Long Point.

The MNCFN has historically had a deep spiritual and cultural connection to the land. The people of the MNCFN continue to make use of their traditional territory for their livelihood as well as spiritual and ceremonial purposes.

Historically, the MNCFN has lived as part of the land. The MNCFN people have survived and prospered through their ties to the land which have included hunting, harvesting, fishing and cultural ceremonies.

These historic uses of the land are mirrored by their importance to the way of life of the modern MNCFN. The MNCFN currently uses its traditional land for harvesting, hunting, fishing, and cultural ceremonies. In turn, the MNCFN is actively involved in protecting the environmental

resources within its traditional territory. The MNCFN of today is as practically and spiritually tied to its traditional territory as were its ancestors.

### Consultation with Enbridge Gas

In the Enbridge Gas “Argument in Chief” filed October 21<sup>st</sup>, 2013, Appendix D, Enbridge Gas stated, “Enbridge and Dillon undertook significant efforts to consult with First Nations and Métis. Only two First Nations intervened. Neither actively participated and one withdrew as an intervenor. It is reasonable to conclude there is no concern that the First Nation or Métis consultation has been anything less than adequate.”

MNCFN objects to the above statement. Meaningful consultation includes a thorough understanding of the topic being discussed. This understanding is impossible without the necessary expertise (technical, environmental, scientific, engineering and legal), and without the necessary gathering of information from our own elders and other land users about the location, nature and extent of our uses of, values in and connections to the land – all of which must be gathered and analysed in a methodologically sound manner.

In meetings with Enbridge Pipelines staff involved in the Enbridge Pipelines Line 9 B Reversal, MNCFN representatives understood that Enbridge Gas would be making an effort to arrange meetings to brief MNCFN on the project and explore interests and concerns. Notification letters are not sufficient to constitute consultation.

Through Enbridge Pipelines’ consultation with MNCFN on the Line 9 B Reversal project, MNCFN and Enbridge Inc. (all Enbridge companies) are currently discussing the development of a long-term relationship agreement that may cover some of the MNCFN’s concerns expressed in this submission. However, the parties have not yet reached an agreement and MNCFN must make its interests clear through this submission. Those discussions are important and may yield future opportunities for meaningful discussion and engagement in Enbridge Inc. projects, but do not include specific consultation on the Enbridge Gas GTA Project.

MNCFN requires meaningful consultation through which the community can gain sufficient information to make informed decisions on proponents’ undertakings. For major undertakings like the Enbridge Gas project, MNCFN requires funding to retain such expertise and to conduct such studies and internal consultation. Without providing the appropriate resources to understand the Project, Enbridge Gas, the Ontario Energy Board and Ontario as a representative of the Crown, cannot claim that the duty to consult and accommodate MNCFN has been met.

Only through conversations with Enbridge Pipeline representatives involved in the Line 9B Reversal Project, three days before this submission, was MNCFN able to obtain funding to hire an archaeologist to review the Enbridge Gas GTA Project archaeological reports and enable MNCFN to provide initial comments with respect to archaeology for this submission.

We respectfully request that a decision on the Project be delayed until Enbridge Gas has provided the appropriate financial resources for MNCFN to retain expertise and review the Project. Only then can MNCFN truly understand the Project and work with Enbridge Gas to resolve concerns.

We seek to start consultation that includes an agreement with Enbridge Gas. We wish to protect our land and water from the damage that may be caused by the proposed GTA Project through site investigation work, site preparation work, construction and refurbishment, pipeline operations, accidents and malfunctions and pipeline decommissioning.

MNCFN expects Enbridge Gas and the Crown to honour their obligations to consult and accommodate our community with respect to our Aboriginal rights and interests. In order to best protect our lands, water and Aboriginal rights and interests, MNCFN requests continued involvement in jointly planning and approving any pipeline site investigations, site preparation, refurbishment, additions, construction, re-construction, operation and decommissioning. MNCFN also insists on being involved in environmental site assessments across our traditional territory so that we can understand existing environmental impacts on these lands and our rights and interests and better predict future environmental impacts.

Ongoing funding from Enbridge Gas would allow MNCFN to conduct the above objectives.

Consultation must always be with the intent of substantially addressing the concerns of the affected aboriginal parties. Addressing such concerns means accommodation. This cannot occur if we are unable to know and understand all of the impacts and their implications to our territory, rights, interests, culture and way of life.

MNCFN is not in a position to provide comment on the technical aspects and potential commercial, environmental, and socio-economic impacts of the proposed Project, because MNCFN does not have the resources required to retain consultants to provide expert comment. MNCFN is not in a position to provide comment on the nature and location of culturally sensitive sites across the vast range of the proposed Project because MNCFN does not have the resources to undertake methodologically supportable traditional land use studies and mapping, independent archaeological studies or environmental site assessments of existing Enbridge pipeline infrastructure to begin to verify site characteristics and locations and begin to assess potential impacts.

The Ontario Energy Board should not issue approvals for work that could destroy or damage such sites. Sites of interest to us may include, but are not limited to:

- places of worship or other sacred purpose;
- burial grounds;
- traditional teaching or meeting places;
- ceremonial lands;

- medicinal sites
- pictographs and petroglyphs;
- trap lines and areas;
- hunting or fishing grounds;
- wildlife migration routes;
- travel or trade routes; and
- waterways.

The MNCFN strongly object to Enbridge Gas receiving approvals for projects in our traditional territory until MNCFN has:

- a) The resources required to retain our own consultants to provide expert advice and comment on technical aspects and potential environmental impacts that may affect our rights and interests.
- b) The resources required to undertake traditional land use studies and mapping and independent archaeological assessments that include experts and information from our members with knowledge and experience in areas to be affected.
- c) The time and capacity to determine where there is a need to apply for certain culturally sensitive sites to be made off limits to exploration so that these sites are not destroyed or harmed.
- d) The time and capacity to determine appropriate mitigation or avoidance strategies for areas where there may be impacts that affect our rights and interests.
- e) Participated in meaningful consultation with Enbridge Gas and the Crown, and where necessary, receive appropriate accommodation.

The MNCFN is actively exercising its constitutional and treaty rights with respect to the duty to consult and accommodate for projects throughout our traditional territory with proponents such as the City of Toronto, Durham Region, Peel Region, York Region, Niagara Region, Ontario Power Generation, Enbridge, Imperial Oil, Samsung, 2015 Pan American Games, Ministry of Transportation, Ontario Power Authority, Hydro One Networks, Waterfront Toronto, and Mississauga Waterfront.

All proponents that require Crown decisions for their projects to advance in our territory must consult with our First Nation and provide necessary accommodation.

## **II. REQUESTED CONDITIONS FOR APPROVAL OF THE PROJECT**

In order to mitigate the potential adverse effects of the Project on the rights, title and interests of MNCFN, the MNCFN requests that the Board place the following conditions on any approval given to Enbridge with respect to the Project:

- a) For each Work Site, Enbridge provide MNCFN with the following information: (i) exact location and size of site; (ii) plans to protect the environment and sensitive watersheds;

and (iii) the contamination characteristics, dewatering details, and water treatment and discharge plans for the site.

- b) Enbridge Gas permit third party contractors (“Monitors”) selected by the MNCFN to actively participate in Enbridge’s environmental and archaeological assessment and monitoring work at any Work Site that has high archaeological potential or has significant environmental concerns, as determined by the MNCFN.
- c) Enbridge Gas provide financial resources to the MNCFN to hire and administer the Monitors and to hire consultants to review all of the permits and approvals that Enbridge has made with respect to the initial construction and any ongoing operations and maintenance activities, to the extent necessary to protect the MNCFN’s rights, title and interests.
- d) Enbridge Gas ensure that adequate insurance and/or funds are available for any cleanup, compensation and restoration in the event of accidents and malfunctions on the MNCFN’s traditional territory resulting from the Project and any operations and maintenance activities in the future.

These conditions apply to the Project construction, in addition to work in furtherance of the Project, because the operations and maintenance activities involve the excavation of soil and the potential to damage or destroy archaeological resources. The Board must take the potential adverse of the work on the MNCFN’s rights and interests into consideration as part of the project as a whole.

### **III. LEGAL BASIS FOR THE REQUESTED CONDITIONS**

#### **The Board has an Obligation to Ensure Adequate Consultation and Accommodation**

The Board has an obligation to assess whether there has been sufficient consultation and accommodation by Enbridge Gas to satisfy the Crown’s duty to consult.

The duty to consult encompasses the Crown’s constitutional obligation to act honorably in consulting with and, when appropriate, accommodating Aboriginal interests when they might be adversely affected. The duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The adverse impact on the Aboriginal right need not be certain; a potential adverse effect will trigger the duty to consult with the MNCFN.

The MNCFN has rights and interests in its traditional territory. The Project for which Enbridge Gas seeks approval runs through the traditional territory. Before Enbridge Gas may undertake the Project it requires approval, and the Crown has given the Board jurisdiction to grant such an approval in appropriate circumstances. The Board’s approval process must therefore be exercised in accordance with the Crown’s duty to consult.

## The Board Should Ensure the Protection of Archaeological Resources in the MNCFN's Traditional Territory

The MNCFN are requesting that Monitors chosen by MNCFN can be present during ongoing archaeological assessments. In addition, the MNCFN are requesting to remain informed of all archaeological activities conducted in preparation for, and during ongoing construction, operations, and maintenance of the Project. These conditions will ensure that any archaeological resources will be proactively identified and protected from damage and destruction caused by the Project.

To begin to specifically address the issue of the archaeological potential of the Project area, MNCFN retained Dr. Fitzgerald. Dr. Fitzgerald is an Ontario Ministry of Tourism, Culture and Sport (the "Ministry") certified archaeologist which means that he has expertise in all stages of archaeological fieldwork.

As noted above, through a request to Enbridge Pipelines, MNCFN was able to make a request to Enbridge Gas for an independent archaeological review of Dillon's Stage 1 assessment and participation within the Stage 2 archaeological assessment. Without sufficient understanding of the Ontario Energy Board process and the Project review schedule, MNCFN was only able to make this request and receive a commitment to funding three days prior to the filing of this submission.

The summary of the Stage 2 archaeological assessment conducted by Dillon for Enbridge reports that only two pieces of worked chert were found along 50km of pipeline corridor in 2013 – this is somewhat surprising considering the density of Aboriginal sites that had been previously found in the broader study area. While not questioning the capability of the archaeological consultant, concerns such as this could have been raised/alleviated had MNCFN archaeologists and monitors been involved in the archaeological process from the beginning.

MNCFN wishes to have sufficient time to properly respond, with sufficient resources for third party expertise, to respond to Enbridge's most recent request (October 2, 2013) for MNCFN consultation/participation in further archaeological investigations. There are additional Stage 2 property investigations and Stage 3 site-specific assessments to be conducted. In MNCFN's archaeologist's most recent correspondence with Enbridge on the day of this filing, Enbridge stated that the Stage 3 assessment of the River site had not started. No mention was made of the status of further Stage 2 assessments or other Stage 3 assessments. MNCFN must immediately become actively involved in all archaeological investigations from this day forward. There are significant cultural sites whose proposed archaeological investigations must be very closely scrutinized.

### The Board Should Ensure the Protection of Environmental Resources in the MNCFN's Traditional Territory

The MNCFN is requesting Monitors be present during the work associated with the Project. The presence of Monitors will allow the MNCFN to meaningfully participate in the Project and be informed of environmental risks to their traditional territory in a timely manner. Furthermore, the MNCFN is requesting evidence of sufficient insurance or funds be made available to finance cleanup and emergency response measures in the event of accidents and malfunctions.

The Project construction and associated ongoing operations and maintenance activities proposed by Enbridge place the environmental resources in the MNCFN's traditional territory at substantial risk, particularly with respect to water crossings and terrestrial and aquatic habitat.

The MNCFN's request to have Monitors present during the work contemplated by the Project and ongoing operations and maintenance activities would allow the MNCFN to be aware of the environmental risks as they occur. This condition would allow the MNCFN to be meaningfully engaged with respect to the Project and help to safeguard their interests.

### The Board Should Order the Conditions Requested by the MNCFN

The MNCFN submits that without additional safeguards, the potential adverse impact of the Project to the environment and archaeological resources in the region are contrary to the public interest. The potential impact to waterways and land in the event of construction damage and operations accidents and malfunctions can lead to long-lasting damage precluding their use and enjoyment by both the MNCFN and Ontarians as a whole. Similarly, the destruction of archaeological resources from either work associated with the Project or in the event of construction damage and operations accidents and malfunctions represents a historical and cultural loss to the MNCFN and to the greater public of Ontario.

The Board has broad discretion to impose terms and conditions on an approval it considers proper. To mitigate the potential adverse impacts of the Project on the MNCFN's rights and interests in its traditional territory, any approval must be contingent on satisfying the conditions proposed by the MNCFN. These conditions are designed to safeguard the environmental and cultural interests of both the MNCFN and the people of Ontario.

Finally, as noted above, the Crown's duty to consult is engaged by the Board's approval process and thus must be satisfied in the context of that approval process. Therefore, the Board's duty to assess and facilitate the consultation and accommodation of the MNCFN must take place *prior* to a decision being made by the Board, regardless of any ongoing discussions between MNCFN and Enbridge.

All of which is respectfully submitted this 8<sup>th</sup> day of November, 2013.