



SENT VIA EMAIL

August 23, 2024

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Subject: Lack of Honour and Procedural Fairness in Transmitter Selection Process – Wawa-Porcupine Transmission Line

Dear Premier Ford, Minister Lecce, and Attorney General Downey,

On August 1, 2024, Chapleau Cree First Nation ("CCFN") was advised that the Ministry of Energy and Electrification ("MOEE") is proposing to issue an Order-in-Council (OiC) and Directive to designate Hydro One Networks Inc. ("Hydro One") as the developer of the Wawa-Porcupine Transmission Line (the "Transmission Line"), rather than Transmission Infrastructure Partnerships 9 ("TIP-9").

At a debrief on August 13, 2024, we learned that this proposal was based on the assessment of an anonymous "Review Committee" that had been struck to assess the Information Packages received in November 2023 and five equally weighted "Criteria for Ranking" had been developed according to an unknown process. A high-level "Summary of Assessment" was provided to us, without any breakdown as to how each Review Committee member assessed the Criteria. **The proposal to designate Hydro One is not reasonable as the selection process and conclusions were neither honourable nor procedurally fair**, and we ask that you take this into account before issuing the OiC and Directive.

The proposal is also a **missed opportunity for Ontario**, as the TIP-9 model is a novel and progressive approach that would move Ontario towards the forefront nationally, and indeed globally, of implementing the principle that Indigenous peoples must grant their free, prior, and informed consent to the development of their traditional territories. **Ownership and control of a development project from the outset implies free, prior, and informed consent**, and thus the TIP-9 model represents a concrete and practical step forward towards reconciliation that is also commercially viable.

For CCFN, a co-owner of TIP-9, the Ministry's proposal will result directly in a loss of ownership and control of the project, a loss of power to mitigate adverse environmental impacts on the lands and waters in our traditional territory during construction, and significant costs to us to secure millions of dollars in



financing to buy into the Transmission Line many years from now. The risk that financing may not be secured and ownership may not be an option for CCFN renders the Hydro One model a clearly insufficient accommodation of CCFN's Treaty and governance rights, as our Homelands will very likely be harmed and our Treaty harvesting rights infringed for the purposes of this project and we therefore have an entitlement to full participation in it.

The Transmission Line will Run Through the Core of CCFN's Traditional Territory

CCFN is a Cree and Treaty 9 Nation, and a member of Mushkegowuk Council. The Omushkego people are the people of the lands and rivers draining into western Weeneebeg and Washaybeyoh. We live and have always lived in the areas identified in the **Map of Mushkegowuk Territory (Mushkegowuk Map)**, attached at Annex "A" to this letter. Our CCFN Homelands, as identified in the Mushkegowuk Map, are the areas throughout which our ancestors lived, worked, cared for the land, and regularly travelled and harvested. These are areas that the Canadian courts recognize and affirm today as Aboriginal title lands based on the legal test of continuous and exclusive use and occupation: *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44. Treaty 9 protects our Nations' rights to govern and carry on our way of life and livelihoods throughout these areas: *Yahey v British Columbia*, 2021 BCSC 1287.

We are a co-plaintiff in a current claim against Ontario for a failure to protect the boreal forest and our Treaty-protected Homelands from the cumulative impacts of resource development that has been authorized without our consent.

On the logical assumption that the Transmission Line will run in more or less a straight line, it will necessarily run **directly through the core of our Homelands**.

The proposal is not reasonable as the selection process and outcome were neither honourable nor procedurally fair

In all its dealings, the Crown must consistently meet the standard of honourable dealing to achieve the public and Constitutional objective of reconciliation.¹ The Supreme Court of Canada recently reaffirmed its position that, "[t]he controlling question . . . is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."² We submit that maintaining the honour of the Crown in this transmitter selection process required a selection process that was:

1. Transparent and free of bias or perceived bias;
2. Conducted based on assessment criteria that were clear and cogent, not vague or over-broad;
3. Assessed in a manner that gave due weight to the First Nations' own assessment of the benefits; and
4. Conducted based on a solid understanding of both the Hydro One and TIP-9 Information Packages.

Regrettably, the **Review Committee process met none of these requirements** and thus its conclusions and the resulting proposal are unreasonable.

¹ *Restoule v Canada (Attorney General)*, 2021 ONCA 779, var'd but not on this point [2024] S.C.J. No. 27, at para 113.

² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 45 as quoted in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 at para. 277.



1. The process was not transparent or free of bias or perceived bias

The identity of the Review Committee members has not been disclosed to us, nor have we been advised of the scores that each member gave to the Information Packages. This **lack of transparency** undermines our confidence in the process, especially when Hydro One has received nine of the last nine transmission lines awarded in Ontario over the last three years.

Moreover, without knowing the identity of the Review Committee members, we cannot know if any of the Committee members may have connections to Hydro One or to one or more of the Wabun communities who chose to support it. Without knowing how each member scored the Information Packages, we cannot know if one or more members swayed the Committee's decision. On August 13, 2024, we requested more information about the approach that was put in place to identify and manage conflicts of interest among Committee members, but no response has been received to date. In the circumstances, we are deeply concerned that there **may have been a bias** among the Committee members in favour of Hydro One or the Wabun communities.

Finally, we have not seen the list of “potentially impacted” Indigenous communities whose “support” apparently trumped the TIP-9 Nations’ support. This is of great concern to us. The benefits of any given economic development project should flow to the Nation(s) whose lands and waters are harmed for the project, if they consent to it. It is up to the impacted Nations to choose to share those benefits with others. **A unilateral decision by the Crown to force impacted Nations to share benefits with other, non-impacted Nations is a wrongful Taking from the impacted community and its seven future generations. It is also an unjust enrichment of the non-impacted community.** As such, this process cannot have been honourable or fair if the mystery list of “potentially impacted” Nations included any Nations whose lands will not in fact be impacted, based on the Crown’s proper assessment, through honourable consultation, of the strength of their claims and the degree of adverse impacts on their rights. The Crown has had more than 40 years since the *Constitution Act, 1982* to conduct this strength of claim assessment. **In an honourable process, the support of non-impacted Nations would not have been weighed against the support of impacted Nations.**³

2. The process was conducted based on assessment criteria that were vague and over-broad

We have many questions and concerns about the Ranking Criteria, but two in particular were clearly vague and overly broad. Criterion 3, a criterion that all the potentially impacted First Nations identified as one of overriding importance, is vague and overly broad in that it calls for an assessment of “decision-making opportunities” for First Nations. Yet the form of “decision-making opportunities” available to First Nations in the Hydro One model, which are of an advisory nature throughout construction (and thus not decision-making power at all), are fundamentally different and far inferior to the “decision-making opportunities” they would have as co-owners of TIP-9. Nevertheless, on the broad and vague wording of the criterion, the two companies could have been given a comparable score by the Committee on this factor. We can only assume that they were, given the outcome.

Further, Criterion 2 required an assessment of “support” from and “engagement with” potentially impacted Indigenous communities without a clear definition of what support or engagement means. The Review Committee seems to have scored this criterion on the basis of a different consideration, *i.e.*,

³ We have made these points clear to the IESO in CCFN’s Submission, dated June 7, 2024, on the proposed Transmitter Selection Framework as well.



whether there was a “confirmation” that all the First Nations who preferred the Hydro One model could later join the TIP-9 coalition. “Support” and “confirmation of inclusion” are two distinct ideas. This demonstrates that there was ample room for Committee members to interpret this criterion however they wished to interpret it in order to prefer Hydro One.

In any event, as noted below and in the TIP-9, TIP-9 did confirm that all **potentially impacted** First Nations could join the Coalition. More is said on this below.

3. The process did not give due weight to the First Nations’ own assessment of the benefits

To be honourable in the sense of recognizing and affirming CCFN Treaty and governance rights in its traditional territories, the Review Committee’s assessment ought to have given due weight to the First Nations’ own assessment of benefits. This was clearly not done because the Ranking Criteria did not align with the First Nations’ own list of key criteria for any partnership.

From the outset of this lengthy process, CCFN has been unequivocal that, as a First Nation whose traditional territory would be directly and adversely impacted by the Transmission Line, CCFN is entitled to full partnership in the Transmission Line project, no matter which company is ultimately designated.⁴ We and our Coalition partners, developed a list of eight criteria that would have to be met in order for the decision to designate a transmitter to be considered honourable in that it would avoid the infringement of Treaty and governance rights in the context of authorizing the development. In August of last year, we decided to move forward in partnership with TIP due to the high degree to which it met our assessment criteria.⁵ We struggle to understand how the Review Committee could reasonably or honourably choose to disregard our First Nations’ carefully crafted criteria and use others in order to find that we were wrong in our assessment of benefits.

Moreover, equal weight was given to Ranking Criterion 3, even though full partnership and control was **consistently identified by all the First Nations involved from the outset as an overriding factor**. As noted above, ownership implies consent to the project throughout, and ownership would have empowered the First Nations to have true control over decisions impacting the health of the lands and waters in their territories, as well as the approach to generating and sharing economic benefits. Criterion 3 is also inextricably linked to Criterion 5, because control over the project would have given the First Nations some control over the economic and other benefits of the project.

In short, in an honourable process Criterion 3 would not have been weighted equally with the others, out of deference to the First Nations who are best placed to assess what is in the best interests of their communities.

4. The process was not based on a solid understanding of both the Hydro One and TIP-9 Information Packages

The Review Committee’s assessment of Criteria 2 and 4 were clearly based on a misunderstanding of the TIP-9 bid. Regarding the assessment of **Criterion 2**, it was incorrect to conclude that TIP-9 did not confirm that other Indigenous communities could join the partnership. TIP-9’s bid was clear on the First Nation partners’ intention to use their laws and traditional decision making to build a consensus on

⁴ **Letter from CCFN to Minister Todd A. Smith, dated March 15, 2023.**

⁵ These points were set out in a Letter to Minister of Energy, dated August 2, 2023 and a follow up Letter to Minister of Energy, dated August 14, 2023.



bringing communities beyond the six most impacted into the full partnership/ownership fold. All proposed partnership models presented to the First Nations similarly provided that impacted Indigenous communities will need to reach consensus on the allocation of the available participation and equity stakes through direct negotiations among themselves. These discussions will need to take place among the First Nations even if Hydro One is the designated transmitter. It should not have been a deciding factor between the two models.

Further, and importantly, the Committee's conclusion on this point completely overlooks the fact that Hydro One also cannot confirm that all impacted communities can "join" as full participants and owners. As noted, the Hydro One model requires First Nations to obtain financing to buy into the project after construction. This means that, not only will CCFN have less control over decisions that will affect its Homelands during construction, there is also a significant risk that CCFN or other impacted First Nations will not be able to buy into the Line after construction at all in the Hydro One Model.

Regarding **Criterion 4**, the conclusion that the lack of "actual interest rate quotes" is problematic because it overlooks the unique and significant advantage in the TIP-9 model, where the First Nations are not being encumbered by any debt at all and will not face the challenge of having to secure an interest rate down the road. The actual interest rate at which First Nations will be able to borrow money cannot be confirmed at this time. Indeed, it cannot be confirmed at this time that the First Nations will be able to get financing at all.

Conclusion

For all of these reasons, we are of the view that the proposal is unreasonable, based as it is on a process that is not procedurally fair or honourable. We must respectfully insist that the government take this into account when considering the proposal and when issuing its OiC and Directive.

Yours truly,

Chief Corston

Mushkegowuk First Nations

