

EB-2021-0205
Enbridge Gas Inc.
Application for Greenstone Pipeline Project Approval – Leave to Construct

Submission of Minodahmun Development LP (MDLP)

January 14, 2022

In accordance with Procedural Order No. 2, please find below MDLP's submission in the above proceeding. This submission has been forwarded to the applicant and to all other registered parties to this proceeding.

1.0 Introduction

Enbridge Gas Inc. (Enbridge Gas) applied to the Ontario Energy Board (OEB) on September 10, 2021, under section 90 of the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B) (OEB Act)*, for an order granting leave to construct of approximately 13 kilometres of Nominal Pipe Size (NPS) 6-inch extra-high pressure (XHP) steel natural gas main and associated facilities in the Municipality of Greenstone (the Project). Enbridge has entered into a Gas Distribution Contract with Greenstone Gold Mine LP (GGM) to provide natural gas service to the Greenstone Gold Mine, an open pit gold mine in the Municipality of Greenstone that will be operated by GGM.

MDLP applied to the OEB for intervenor status in this proceeding on September 24, 2021, and was subsequently granted intervenor status. MDLP is a 100% First Nation owned partnership created by Animbiigoo Zaagi'igan Anishinaabek (AZA), Aroland First Nation (AFN) and Ginoogaming First Nation (GFN) (collectively - MDLP First Nation members) to maximize First Nation participation in development projects. Minodahmun's goal is to ensure that benefits from development projects are shared equitably with MDLP First Nation members to grow the local economy and provide opportunities for its members.

The Ministry of Northern Development and Mines (MENDM) by way of a letter delegated the procedural aspects of the Crown's duty to consult for the Project to Enbridge Gas on January 30, 2019 (Delegation Letter). In the Delegation Letter the MENDM identified seven First Nations to be consulted about the Project, including AZA, AFN and GFN who are represented in this proceeding by MDLP.

GGM is a signatory to a Long-term Relationship Agreement (LTRA) with the MDLP First Nation members, with MDLP representing the First Nation members in implementing aspects of the LTRA. The LTRA formalizes GGM's commitment towards accommodating the MDLP First Nation members' concerns including through measures to protect the environment and social and cultural practices, and to seek to maximize offset benefits through employment, training, business and contracting opportunities.

MDLP, AZA, AFN and GFN are affected by this Application with respect to treaty rights, land use, cultural heritage, and the right to and need for accommodation for any impacts including measures that provide offset benefits. MDLP has been participating actively and responsibly in this proceeding, including reviewing the Enbridge Gas application and related evidence, submitting Interrogatories to Enbridge Gas on December 3, 2021, reviewing the Interrogatories of Board Staff and other parties, reviewing Enbridge Gas' replies to Interrogatories, and reviewing the submissions of Board Staff and other parties available to-date.

2.0 Indigenous Consultation

Enbridge Gas filed an Indigenous Consultation Report (ICR) with MENDM on September 10, 2021, Enbridge Gas sent an updated Indigenous Consultation Log to MENDM on November 26, 2021 and included this document in its Interrogatory Response filed with the OEB on December 17, 2021. In its Interrogatory Response Enbridge Gas noted that no specific issues were raised by the Indigenous communities since September 10, 2021. *This is not correct.*

MDLP completed a report entitled "Technical Review of the 2021 Enbridge Greenstone Pipeline: Environmental Report" dated October 27th, 2021. This report identified 22 specific comments and a variety of recommendations regarding the Project. This report was provided to Enbridge Gas on October 29th, 2021. Subsequently MDLP and Enbridge Gas held a videoconference on November 24th, 2021 to discuss the report. This resulted in a variety of follow up tasks which are still underway.

This report contained comments and recommendations reflecting the First Nation member concerns with the impacts of the Project on the environment and the rights and interests which require and rely on and are affected by impacts to this environment.

MDLP is concerned that the specific issues that MDLP and MDLP First Nation members have raised with Enbridge Gas since September 10, 2021 have not been addressed. Certain commitments require a legally binding instrument (agreement) in order to be effectively dispositioned. This agreement would enable the parties to enforce obligations on themselves and others such as contractors and funders. The outstanding issues include:

- maximizing Indigenous community participation through construction of the Project including through employment and business contracting;
- enabling MDLP First Nation members to collect and provide to Enbridge Gas Indigenous Traditional Knowledge (ITK) that Enbridge Gas can and should consider when preparing Environmental Protection Plans (EPPs);
- facilitating environmental monitoring by the MDLP First Nation members;
- enabling MDLP First Nation members to review and comment on various Crown permit applications required for Project environmental approvals,

- facilitating MDLP First Nation members' participation in Project oversight through an implementation committee structure; and
- facilitating economic reconciliation opportunities associated with the Project in parallel with the provisions in the MDLP-GGM LTRA.

Both MDLP and Enbridge Gas have made significant efforts to engage with each other to determine appropriate accommodations for an MDLP-Enbridge Gas agreement that will address material concerns with the Project, and address potential adverse impacts on treaty rights and interests. The parties have been working on embedding these accommodation measures into a legally binding agreement. The COVID-19 pandemic's impacts on MDLP First Nation members has impeded discussions to some degree, but MDLP remains optimistic that a binding agreement can be reached. However, until an MDLP-Enbridge Gas agreement is executed, MDLP and MDLP First Nation members' outstanding issues cannot be considered to be resolved, and MENDM should not issue a Sufficiency Letter to confirm its view that the duty to consult has been adequately addressed for the Project.

OEB staff submits (OEB Staff submission, January 13, 2022) that Enbridge Gas appears to have made efforts to engage with affected Indigenous groups and no concerns that could materially affect the Project have been raised through its consultation to date. OEB staff observes that Enbridge Gas appears to be cooperating with the Indigenous communities during the consultation process and that it made commitments to the Indigenous communities related to the Project. OEB staff is not aware of any potential adverse impacts of the Project to any Aboriginal or treaty rights.

First, concerns have indeed been raised by the MDLP First Nation members as stipulated in submissions to Enbridge Gas. These concerns relate to adverse effects on the environment and rights (the environment is a necessary pre-condition to exercise of these treaty rights). These concerns remain unaddressed as of the date of these submissions. The duty to consult is not met by merely "making efforts to engage" or "cooperating". It is only met by demonstrating the intent to substantially address the concerns of the affecting Aboriginal people about the impacts on their rights and interests. That substantial addressing is carried out through accommodation measures which include measures to prevent impacts, mitigate impacts and compensate for impacts that remain. The commitments that the OEB Staff list that Enbridge Gas has made do not meet this threshold:

Commitments listed by OEB Staff in its January 13, 2022 submission, and MDLP comments:

1. Enbridge Gas will continue to explore business opportunities with Indigenous communities related to the Project;

MDLP comment: "Exploring" opportunities is weak and requires nothing other than some looking into the matter; the commitment should be take

all reasonable steps to maximize, including through priority access, Indigenous participation in economic opportunities.

2. Enbridge Gas has agreed to provide capacity funding to allow for Indigenous community participation during this regulatory process and through construction of the Project.

MDLP comment: This might be sufficient but this commitment has not been made or solidified for MDLP First Nation members for anything beyond the immediate future.

3. Enbridge Gas has agreed to provide information about permits required for various environmental aspects of the Project to Indigenous communities

MDLP comment: This is incomplete in that provision of information from one party is only one aspect of a dialogue, which must also include facilitating the analysis so that information and review and comment by the other party so it can provide its own information back to Enbridge Gas.

4. Enbridge Gas has agreed to consider Indigenous Traditional Knowledge when preparing the EPP and incorporate as appropriate

MDLP comment: “Consider” is far too weak, as that requires only looking at it; its does not require acting on and incorporating it to adjust plans and actions, which is what the commitment should be.

5. Enbridge Gas agreed to host biweekly meetings with MDLP and the communities represented by MDLP throughout construction of the Project.

MDLP comment: Hosting meetings is a weak commitment; the commitment should be to facilitate mutual information sharing, understanding and input into decision making. Hosting meetings is merely the table; it must be set and food served.

The duty to consult is not merely procedural but is also substantive and must always be carried out by the Crown (and those to whom the Crown delegates aspects of the duty) in good faith with the intent to substantially address the concerns of the affected Aboriginal peoples. This means the requirement to accommodate, through measures to prevent, mitigate and compensate for adverse effects. This has been the law in Canada since 1997, confirmed in 2004 and repeated multiple times since (*Delgamuukw v BC* [1997] 3 SCR 1010 para 168; *Haida v BC* [2004] 3 SCR 511 paras 42 to 47).

Should MDLP and Enbridge Gas execute an agreement to address outstanding concerns raised by MDLP and MDLP First Nation members, then MDLP will immediately file a letter to this effect with the OEB and notify MENDM.

3.0 Project Costs and Economics

MDLP is interested to see reductions of greenhouse gas emissions from the Project and GGM operations, and reductions in the cost of energy to GGM as a ratepayer. Enbridge Gas has stated that it is not aware of opportunities that would “reliably and economically reduce the size of the pipeline in the short or long-term.” Considering the option of the GGM to implement Demand Side Management (DSM) programs to reduce the planned pipeline size, in its Interrogatory Response Enbridge Gas stated that it was not aware of such opportunities that would “...reliably and economically reduce the size of the pipeline in the short or long-term.”

MDLP submits that DSM programs should be considered to reduce the cumulative impacts of greenhouse gas emissions from the Project and reduce the cost of energy to GGM. Enbridge Gas can assist GGM with the application of DSM programs through the fully integrated DSM Plan for the 2023-2027 period, which is currently under review by the OEB (EB-2021-0002).

MDLP has no concerns with the recovery of the Project costs. Enbridge Gas has provided sufficient evidence that all the costs for the Project would be recovered from GGM, either through the CIAC or in distribution rates, even assuming that GGM applies DSM programs in collaboration with Enbridge. However, Enbridge Gas should make best efforts to assist GGM to apply reasonable DSM options.

In the Interrogatories MDLP submitted to Enbridge Gas on December 3, 2021, MDLP asked Enbridge Gas to provide an estimate of the Project costs of consulting First Nations for the Project. In its Interrogatory Response of December 17, 2021 Enbridge declined to provide this information. In a recent OEB decision – EB-2021-0015¹ – the OEB accepted the following three issues cited by an Indigenous intervenor as being within the scope of reviewing costs within a proceeding:

- a. Costs related to the proponent fulfilling the procedural aspects of the duty to consult First Nations in relation to its projects
- b. Costs related to the proponent’s engagement of First Nations with respect to archaeological and cultural heritage matters arising from its projects and
- c. Costs related to the proponent’s engagement of First Nations with respect to federal, provincial and municipal Crown permits and approvals required by its projects.

MDLP submits to the OEB that in future Enbridge Gas proceedings before the OEB, that it is in the best interests of the ratepayers of Ontario, including First Nation

¹ EB-2021-0015: Elexicon Energy Inc. Application for electricity rates beginning January 1, 2022 – OEB Procedural Order No. 2, October 19, 2021 (Revised November 17, 2021)

ratepayers, that Enbridge Gas transparently provide information on the above costs within its applications before the Board.

4.0 Conditions of Approval

MDLP submits that along with the OEB's Standard Conditions of Approval for leave to construct applications for section 90 applications, the OEB should require the following conditions prior to granting leave to construct:

1. Authorization for leave to construct is subject to Enbridge Gas addressing in good faith the outstanding concerns raised by MDLP and MDLP First Nation members, through provision of accommodation measures set out in a legally binding agreement.
2. Authorization for leave to construct is subject to Enbridge Gas filing with the OEB a Sufficiency Letter from the Ministry of Energy confirming that Enbridge Gas has satisfied delegated aspects of the Crown's duty to consult (including through provision of accommodation measures as stated in number 2 above) with respect to the proposed Project.
3. Enbridge Gas shall file with the OEB a post construction report, no more than three months prior to the in-service date which shall describe any outstanding concerns identified by Indigenous groups during construction, and details of the actions taken or planned to be taken to prevent or mitigate or compensate for any identified impacts of construction with respect to asserted or known Aboriginal and treaty rights and interests, and details of consultation in respect of same.
4. Enbridge Gas shall file with the OEB a final monitoring report, no later than fifteen months after the in-service date, which shall describe the effectiveness of any actions taken to prevent or mitigate or compensate for any identified impacts of construction with respect to asserted or known Aboriginal and treaty rights and interests.
5. Enbridge Gas shall, no later than fifteen months after the in-service date, file with the OEB a report identifying the specific Demand Side Management (DSM) program offerings available to GGM and discussed with GGM as per the fully integrated DSM Plan for the 2023-2027 period which is currently under review by the OEB (EB-2021-0002).