

March 7, 2022

By E-mail

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ontario Energy Board Registrar,

Re: Letter of Intervention – Ontario Energy Board Application File Number EB-2022-0012

We write on behalf of the Haudenosaunee Development Institute (“**HDI**”) in response to the Ontario Energy Board Notice for Leave to Construct Application EB-2022-0012, dated February 17, 2022.

We submit this Letter of Intervention pursuant to Rule 22 of the *Ontario Energy Board Rules of Practice and Procedure* to confirm HDI’s intervenor status in OEB Application File Number EB-2022-0012 (“**EB-2022-0012**”).

The Haudenosaunee Development Institute

The HDI acts with delegated authority from the Haudenosaunee Confederacy Chiefs Council (“**HCCC**”), the collective rights holder on behalf of the Haudenosaunee. The HCCC is historically and presently representative of the Haudenosaunee and is empowered to advance their collective inherent and treaty rights and interests.

The HDI acts on behalf of the HCCC in respect of development issues on lands where the HCCC holds an interest.

HDI’s Interest in EB-2022-0012

EB-2022-0012 concerns the proposed replacement of a pipeline by Sun-Canadian Pipe Line Company Limited (“**Sun-Canadian**”) in the vicinity of the East Sixteen Mile Creek crossing (the “**Proposed Site**”), in the Town of Milton, Ontario.

The Proposed Site is situated within an area of land subject to the Nanfan Treaty of 1701. The Nanfan Treaty applies to a great swath of modern-day Ontario and provides that the Haudenosaunee may practice traditional land use on Nanfan Treaty lands.

The Nanfan Treaty, as well as the Haudenosaunee’s historical and traditional use of the Nanfan Treaty lands, grounds the Haudenosaunee rights and interests in the Proposed Site.

The HDI has significant concerns relating to the proposed pipeline replacement. These concerns include, but are not limited to, detrimental environmental effects resulting from the removal, replacement, and operation of the proposed pipeline, disruption of the environment and ecology of the surrounding land, and sustainable development of historical and traditional Haudenosaunee lands. Where these concerns arise, the HDI is available to assist developers and tribunals with understanding and applying the Haudenosaunee perspective to development projects.

The Ministry of Energy provided a letter to Sun-Canadian on July 28, 2020 that explicitly recognized the HCCC as an Indigenous community that may be adversely affected by EB-2022-0012. A copy of the letter is attached as **Appendix “A”**.

Grounds for the Intervention

The OEB acknowledges “the duty to consult Indigenous Communities potentially affected by the proposed pipeline”.¹ The OEB’s website further recognizes that, “At the OEB, the duty to consult most often arises when we review applications for approval to build new natural gas infrastructure such as a natural gas pipeline, which are called “leave to construct” applications.”²

The duty to consult the HCCC, in particular, was explicitly recognized by the Ministry of Energy in their July 28, 2020 letter. The HDI agrees with the Ministry that HCCC must be consulted in relation to EB-2022-0012. The letter also acknowledged the need to copy the HDI on all correspondence with the HCCC.

Procedural aspects of the OEB’s duty to consult were delegated to Sun-Canadian by the Ministry.³ Since August 12, 2020, Sun-Canadian has made efforts to consult with the HDI. It is the HDI’s position that, to date, those efforts have fallen short.

The Notice states that the OEB hearing will assess whether this duty was discharged with respect to EB-2022-0012.

Intervention of the HDI in EB-2022-0012 is necessary to: **1)** effectively and comprehensively **assess** whether the duty to consult the HCCC has been properly discharged; and **2)** actually **discharge** the OEB’s duty to consult.

In assessing whether the duty has been charged, the HDI will provide the HCCC and Haudenosaunee views on the theoretical scope of consultation and the execution of the consultation to date. To include Sun-Canadian and exclude the HDI is to hear only one side of the story. The HDI is uniquely capable of providing important evidence and relevant knowledge that will assist the OEB in resolving whether proper consultation has taken place.

In discharging its duty to consult, the OEB must hear the HDI directly. As established by the Supreme Court of Canada in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, the OEB is the vehicle through which the Crown exercises executive powers authorized by the legislature. In such a case, any distinction between the Crown and the OEB for the purposes of this duty falls away.⁴ It is therefore the duty of the OEB, as an extension of the Crown, that must be discharged,

¹ See Ontario Energy Board Notice for Leave to Construct Application EB-2022-0012, dated February 17, 2022.

² <https://www.oeb.ca/stakeholder-engagement/consultation-indigenous-peoples>.

³ See letter from Ministry of Energy to Sun-Canadian, dated July 28, 2020, attached as Appendix “A”.

⁴ *Clyde River (Hamlet) v Petroleum Geo Services Inc.*, 2017 SCC 40 at para 29.

not that of Sun-Canadian. The OEB cannot properly discharge its duty without the HDI's perspective.

The HDI has a longstanding interest in the Proposed Site. Given the HDI's concerns with the replacement of the pipeline, and its singular ability to provide the Haudenosaunee perspective, the HDI's intervention in the hearing is necessary to adjudicate EB-2022-0012 in a comprehensive manner. The HDI will participate actively and responsibly in the proceeding to assist the Board in concluding the matter in the most efficient and just way possible.

HDI's Intended Participation

The HDI intends to submit evidence and argument in order to better inform the OEB of the potential implications of the EB-2022-0012 at the Proposed Site.

Request for Oral Hearing

While it is understood that EB-2022-0012 is presently being adjudicated through written submissions, the HDI requests that this application be adjudicated by way of oral hearing. The present matter is of such complexity that written submissions alone are insufficient to effectively adjudicate its resolution. As established in *Clyde River*, oral hearings ensure procedural fairness.⁵

Further, an oral hearing is required as the tendering of portions of HDI's evidence is only possible, or ideally suited, through oral testimony redolent of Haudenosaunee oral traditions.

* * *

The HDI intends to seek an award of costs, pursuant to paragraphs 3.03(b) and 3.03(c) of the OEB's *Practice Direction on Cost Awards*, which permits a party in an OEB process to apply for a cost award where the party:

3.03(b): primarily represents an interest or policy perspective relevant to the OEB's mandate and to the proceeding for which cost award eligibility is sought; or

3.03(c): is a person with an interest in land that is affected by the process.

The HDI represents an interest relevant to the Board's mandate regarding engagement of Indigenous communities and is a person with an interest in the land affected by the process.

The HDI also requests the written evidence in this matter.

Contact information for the HDI is as follows:

Tim Gilbert (external counsel)
Gilbert's LLP
181 University Ave, Suite 2200
Toronto ON, M5H 3M7

Aaron Detlor (internal counsel)
Haudenosaunee Development Institute
16 Sunrise Court, Suite 600, P.O. Box 714
Ohsweken ON, N0A 1M0

⁵ *Clyde River (Hamlet) v Petroleum Geo Services Inc.*, 2017 SCC 40 at para 47.

416-703-1100
tim@gilbertslaw.ca

519-445-4222
aaron@detlorlaw.ca

Yours truly,

GILBERT'S LLP

A handwritten signature in blue ink, appearing to be 'Tim Gilbert', with a large, stylized initial 'T' and 'G'.

Tim Gilbert

APPENDIX '5

Ministry of Energy, Northern
Development and Mines

77 Grenville Street
6th Floor
Toronto ON M7A 2C1

Ministère de l'Énergie, du
Développement du Nord et des
Mines

77, rue Grenville
6^e étage
Toronto ON M7A 2C1



VIA EMAIL

July 28, 2020

Susan Jackson
Manager Environment, Health & Safety
Sun-Canadian Pipe Line
150 – 6th Avenue S.W.
Calgary, Alberta T2P 3E3

Re: SCPL East Sixteen Mile Crossing Replacement

Dear Susan Jackson:

Thank you for your email dated June 11, 2020 notifying the Ministry of Energy, Northern Development and Mines (ENDM) of Sun-Canadian Pipe Line's intention to apply to the Ontario Energy Board (OEB) for Leave to Construct for the SCPL East Sixteen Mile Crossing Replacement (the Project).

I understand that Sun-Canadian Pipe Line is has identified the need to replace approximately 500m segment of an existing 12-inch diameter pipeline (TRL system) near Trafalgar Road and south of Britannia Road in the Town of Milton. The existing pipeline segment crosses under East Sixteen Mile creek and has become exposed in several locations in the watercourse due to ongoing erosion and creek meander. This project intends to install a new segment of 12-inch diameter pipe via horizontal directional drilling at a greater depth to eliminate the environmental risks of the current pipe exposure.

On behalf of the Government of Ontario (the Crown), ENDM has reviewed the information provided by Sun-Canadian Pipe Line with respect to the Project and assessed it against the Crown's current understanding of the interests and rights of Aboriginal communities who hold or claim Aboriginal or treaty rights protected under Section 35 of Canada's Constitution Act 1982 (Indigenous Communities) in the area. In doing so, ENDM has determined that the Project may have the potential to affect such Indigenous communities.

The Crown has a constitutional duty to consult and, where appropriate, accommodate Indigenous communities when the Crown contemplates conduct that might adversely impact established or asserted Aboriginal or Treaty rights. These consultations are in addition to consultation imposed by statute.

While the legal responsibility to meet the duty to consult lies with the Crown, the Crown may delegate the day-to-day, procedural aspects of consultation to project Proponents. Such a delegation by the Crown to Proponents is routine practice for ENDM.

I am writing to advise you that on behalf of the Crown, ENDM is delegating the procedural aspects of consultation in respect of the Project to Sun-Canadian Pipe Line (Proponent) through this letter. ENDM expects that the Proponent will undertake the procedural aspects of consultation with respect to any regulated requirements for the proposed Project. The Crown will fulfill the substantive aspects of consultation and retain oversight over all aspects of the process for fulfilling the Crown’s duty.

Please see the appendix for information on the roles and responsibilities of both the Crown and the Proponent.

Based on the Crown’s assessment of First Nation and Métis community rights and potential project impacts, the following Indigenous communities should be consulted on the basis that they have or may have constitutionally protected Aboriginal or Treaty rights that may be adversely affected by the Project.

Community	Mailing Address
Mississaugas of the New Credit First Nation	2789 Mississauga Road R.R. #6 Hagersville, ON N0A 1H0
Six Nations of the Grand River *	Six Nations of the Grand River Elected Council PO Box 5000 Ohsweken, Ontario N0A 1M0 Haudenosaunee Confederacy Chiefs Council P.O Box 714 Ohsweken, ON N0A 1M0
Huron Wendat**	255, place Chef Michel Laveau Wendake, QC G0A 4V0

**Please note, proponents are required to consult with both, Six Nations Elected Council and Haudenosaunee Confederacy Chiefs Council (HCCC). Please copy Haudenosaunee Development Institute (HDI) on all correspondence to Haudenosaunee Confederacy Chiefs Council (HCCC).*

***interests are specific to archeological resources*

This rights-based consultation list is based on information that is subject to change. Consultation is ongoing throughout the duration of the project, including project development and design, consultation, approvals, construction, operation and decommissioning. First Nation and Métis communities may make new rights assertions

at any time, and further project related developments can occur that may require additional First Nation and/or Métis communities to be notified and/or consulted. If you become aware of potential rights impacts on Indigenous communities that are not listed above at any stage of project, please bring this to the attention of ENDM with any supporting information regarding the claim at your earliest convenience.

ENDM is assuming a coordinating role within government in relation to rights-based Aboriginal consultation on the Project. We recommend contacting the following ministry representatives if you have any questions or concerns relating to a specific ministry's mandate:

Ministry/Contact	Phone/Email
Ministry of Energy, Northern Development and Mines Kristen Bromfield – Policy Advisor, Indigenous Energy Policy Unit	(416) 735-3297 kristen.bromfield@ontario.ca
Ministry of Environment, Conservation and Parks Peter Brown – Consultation Advisor, Environmental Assessment and Permissions Division	(416) 314-0149 peter.brown@ontario.ca
Ministry of Transportation Donna Bigelow - Team Lead, Indigenous Relations Branch	(647) 537-9423 donna.bigelow@ontario.ca
Ministry of Government and Consumer Services Uyen Ha – Senior Policy Advisor, Infrastructure Projects - Realty	(437) 994-8446 Uyen.ha@ontario.ca
Ministry of Heritage, Sport, Tourism and Culture Industries Karla Barboza - Team Lead, Heritage, Tourism and Culture Division	(416) 314-7120 karla.barboza@ontario.ca

Acknowledgement

By accepting this letter, the Proponent acknowledges this Crown delegation and the procedural consultation responsibilities enumerated in the appendix. If you have any questions about this request, you may contact Kristen Bromfield (see above).

I trust that this information provides clarity and direction regarding the respective roles of the Crown and Sun-Canadian Pipe Line. If you have any questions about this letter or require any additional information, please contact me directly.

Sincerely,



Dan Delaquis
Manager, Indigenous Energy Policy

C: Ontario Pipeline Coordinating Committee (OPCC)

APPENDIX: PROCEDURAL CONSULTATION

Roles and Responsibilities Delegated to the Proponent

On behalf of the Crown, please be advised that your responsibilities as Project Proponent for this Project include: