

April 8, 2022

By Filing Online

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

Dear Ontario Energy Board Registrar,

Re: Intervenor (HDI) Evidence – Ontario Energy Board Application File Number EB-2022-0012

We are counsel to the Haudenosaunee Development Institute (“**HDI**”), intervenor in Ontario Energy Board Application File Number EB-2022-0012 (“**EB-2022-0012**”). We write in response to Procedural Order No. 1, dated March 22, 2022.

Pursuant to the Order, this letter provides information regarding HDI’s expected evidence in EB-2022-0012.

Background

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.

Sun-Canadian’s application triggers the duty to engage Indigenous communities potentially affected by the proposed pipeline.¹ Implicit in the duty to engage, and as set out by the Supreme Court of Canada in *Clyde River (Hamlet) v Petroleum Geo Services Inc*, is the notion that the OEB is the vehicle through which the Crown exercises executive powers authorized by the legislature. Any distinction between the Crown and the OEB for the purposes of this duty is immaterial.²

The Crown, through the Ministry of Energy, Northern Development and Mines, delegated the procedural aspects of its (and by extension, the OEB’s) duty to Sun-Canadian.³

¹ See e.g. Ontario Energy Board Notice for Leave to Construct Application EB-2022-0012, dated February 17, 2022; also see <https://www.oeb.ca/stakeholder-engagement/consultation-indigenous-peoples>.

² *Clyde River (Hamlet) v Petroleum Geo Services Inc*, 2017 SCC 40 at para 29.

³ See letter from Ministry of Energy, Northern Development and Mines to Sun-Canadian, dated July 28, 2020.

Substantive aspects of the duty to engage, however, remain with the OEB. The honour of the Crown cannot be delegated.⁴ Indeed, in its July 28, 2020 letter to Sun-Canadian, the Ministry expressed that the “Crown will fulfill the substantive aspects of consultation and retain oversight over all aspects of the process for fulfilling the Crown’s duty.”

To date, HDI has not received information relating to how the OEB plans on discharging its substantive duties to engage.

Expected Evidence

HDI has significant concerns relating to the proposed pipeline replacement, as well as the OEB’s fulfillment of its engagement obligations. HDI expects its evidence in EB-2022-0012 to cover:

1. The nature of Haudenosaunee rights in respect of the Proposed Site;
2. The nature of the harm resulting from the pipeline including, but not limited to:
 - a. Harm to Haudenosaunee rights;
 - b. Harm to the surrounding environment, including cumulative impacts;
 - c. Harm to the Haudenosaunee treaty-based relationship with the Crown, which will include evidence relating to, *inter alia*:
 - i. Royal Commission on Aboriginal Peoples;
 - ii. Report on Missing and Murdered Indigenous Women;
 - iii. Truth and Reconciliation Commission; and
 - iv. *United Nations Declaration on the Rights of Indigenous Peoples Act*;
 - d. Harm to advancing the goals of reconciliation; and
3. Sun-Canadian, OEB, and Crown engagement with the Haudenosaunee, Haudenosaunee Confederacy Chiefs Council (“**HCCC**”), and HDI in respect of the pipeline to date, including mitigation and compensation to address the above harms and interference with treaty rights.

Written Interrogatories

HDI will submit written interrogatories to Sun-Canadian and the OEB. Oral interrogatories, however, are necessary to fully canvass the broad range of relevant issues present in this application.

Interrogatories in respect of the OEB will cover:

- The nature and circumstances of the delegation of procedural aspects of the duty to engage by the Minister;
- Engagement with the Haudenosaunee, HCCC, and HDI to date; and
- The OEB engagement process generally, including the composition of the Board.

Interrogatories in respect of Sun-Canadian will cover:

- The nature and circumstances of the delegation of procedural aspects of the duty to engage by the Minister;
- Engagement with the Haudenosaunee, HCCC, and HDI to date;
- Environmental matters, including mitigation efforts and cumulative impacts;
- Project alternatives; and

⁴ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53.

- Compensation provided to landowners.

Timeline and Costs

HDI proposes submitting its evidence within one month of receipt of the last response to written interrogatories.

At this time, HDI is not in a position to provide a precise estimate of its costs for the preparation of evidence. Given the effect the interrogatory responses will have on the scope and breadth of necessary evidence, such an estimate can be provided upon the receipt of the responses.

HDI has already retained one expert in the field of economics (for the purposes of assessing harm to Haudenosaunee rights) and expects other expert evidence may be required. Expert fees will accumulate in line with the Cost Award Tariff provided for in the OEB Practice Direction on Cost Awards. Further, HDI will claim costs for no more than one lawyer attending any hearing on the merits of the application.

Notwithstanding the foregoing, HDI anticipates its costs for the preparation of evidence to be approximately \$25,000, exclusive of any applicable taxes and disbursements.

Yours truly,

GILBERT'S LLP



Tim Gilbert