

EB-2022-0012

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; and
in particular sections 90(1), 96(1), and 97 thereof

AND IN THE MATTER OF an application by Sun-Canadian Pipe Line Limited to construct
the NPS 12 East Sixteen Mile Creek Pipeline Replacement Project in the Town of Milton,
Ontario

WRITTEN INTERROGATORIES

(for Ontario Energy Board)

GILBERT'S LLP

Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Tim Gilbert
Jack MacDonald
Jonathan Martin

Tel: 416.703.1100
Fax: 416.703.7422

Lawyers for the Haudenosaunee
Development Institute (Intervenor)

INDIGENOUS CONSULTATION

Interrogatory # 6-HDI-1

Reference: Exhibit G, Schedule 5, pages 248-256

“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.”

Questions:

1. Please provide any documents relating to the ENDM’s delegation of procedural aspects of engagement to Sun-Canadian, including but not limited to the documents relied upon by the Crown to determine the nature and scope of engagement.
2. Please advise how and when HDI was provided the opportunity to set out and clarify rights and interests.
3. Please advise how and when the Crown contemplated cumulative impacts upon the rights and interests of the Haudenosaunee in determining the obligation to justify infringements of Haudenosaunee rights and interests
4. Please advise how and when the Crown contemplated cumulative impacts upon the rights and interests of the Haudenosaunee in undertaking substantive engagement with the Haudenosaunee.
5. Please provide any documents setting out how and when the Crown provided funding to the Haudenosaunee, HCCC, and/or HDI with respect to allowing meaningful participation in the subject application (“**EB-2022-0012**”) process.
6. Please provide any documentation setting out how and when the Haudenosaunee, HCCC, and/or HDI have been engaged with respect to the preparation, drafting, or implementation of the OEB’s “Consultation with Indigenous Peoples” policy.¹

Interrogatory # 6-HDI-2

Reference: Exhibit F, Schedule 1, pages 58-61; Appendix 1 – Environmental Report, pages 76-176

Questions:

1. Please provide any documentation setting out how and when the OEB determined that consideration of established Indigenous rights and interests is best accomplished by way of the Environmental Guidelines for Hydrocarbon Pipelines and Facilities on Ontario (“**Environmental Guidelines**”).²

¹ See <https://www.oeb.ca/stakeholder-engagement/consultation-indigenous-peoples>.

² Environmental Guidelines accessible at: <https://www.oeb.ca/regulatory-rules-and-documents/rules-codes-and-requirements/environmental-guidelines-hydrocarbon-pipelines>.

- a. Please provide any documentation of notification to the Haudenosaunee, HCCC, and/or HDI with respect to the OEB’s decision to rely upon the Environmental Guidelines as a means of testing the sufficiency of the duty to engage with Indigenous peoples.
 - b. Please provide any documentation setting out how and when the OEB allowed the Haudenosaunee, HCCC, and/or HDI to set out and clarify their rights and interests in relation to the engagement process prescribed by the Environmental Guidelines.
2. Please advise if it is the position of the OEB that it can discharge its obligation to uphold the honour of the Crown by way of the process established through the Environmental Guidelines.
3. Please provide any documentation evidencing the OEB’s consideration of the conflict of interest created where the OEB unilaterally creates the standard by which sufficiency of engagement is to be considered (i.e., the Environmental Guidelines) and the Crown assesses the sufficiency of engagement through its own commissioners.
 - a. Please provide any documentation relied upon in the preparation and/or drafting of the Environmental Guidelines, in particular page 9 of the Guidelines, wherein the OEB states that it “will assess the adequacy of the Crown’s consultation efforts as part of the leave to construct hearing process.”³
 - b. Please provide any documentation generated by the OEB in considering whether the OEB placed itself in a conflict of interest with respect to page 9 of the Environmental Guidelines and, in particular, the OEB’s position that it is capable of assessing the sufficiency of its own obligations to uphold the honour of the Crown.
 - c. Please advise whether the Crown has engaged with the Haudenosaunee, HCCC, and/or HDI in respect of the selection of OEB commissioners.
4. Page 9 of the Environmental Guidelines provides: “If the Crown determines that there is a duty to consult with potentially affected Indigenous communities, the applicant should also provide an Indigenous Consultation Report describing the consultation activities undertaken and their timing, and a summary of the rights-based concerns raised by Indigenous communities, if any, and how the concerns were addressed and/or accommodated.”
 - a. Please advise whether the OEB takes the position that a third party is lawfully capable of addressing and/or accommodating rights-based issues including those raised in this matter by HDI.
 - b. Please advise how the OEB tests the veracity of an applicant’s “Indigenous Consultation Report”.
 - c. Please provide any documents generated by the OEB supporting the delegation of engagement to a third party on rights-based issues and/or accommodations as contemplated by page 9 of the Environmental Guidelines.
5. Please advise whether the Haudenosaunee, HCCC, and/or HDI were invited to participate in the Ontario Pipeline Coordinating Committee (“OPCC”).

³ See Environmental Guidelines, 1.3.1 OPCC Review Process at page 9, accessible here: <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2019-01/Environmental-Guidelines-HydrocarbonPipelines-20160811.pdf>.

6. Please provide the delegation of engagement for the obligation to uphold the honour of the Crown to the OPCC from the following entities:
 - a. Technical Standards and Safety Authority;
 - b. Ministry of Energy;
 - c. Ministry of Environment and Climate Change;
 - d. Ministry of Agriculture, Food and Rural Affairs;
 - e. Ministry of Tourism, Culture and Sport;
 - f. Ministry of Municipal Affairs and Housing;
 - g. Ministry of Natural Resources and Forestry;
 - h. Ministry of Transportation;
 - i. Infrastructure Ontario; and
 - j. Ministry of Economic Development, Employment and Infrastructure.⁴
7. Please advise how the delegates to the OPCC considered the rights and interests of the Haudenosaunee in developing the Environmental Guidelines and provide any documents generated, used, or contemplated therein.
8. Please advise on the definition of an “Indigenous community” as used in the Environmental Guidelines and whether the HCCC is contemplated as being an “Indigenous community”.⁵
9. Please provide any documents in the power, possession, or control of the OEB in relation to the following (or identify in the EB-2022-0012 record):⁶
 - a. “Applicants for projects shall contact the Ministry of Energy early in the project planning process, as soon as the need, terminal points, project characteristics and the general location are determined and provide a description of the project’s characteristics and location to the Ministry of Energy.”
 - b. “The Ministry of Energy will determine whether the proposed project triggers a duty to consult. If so, the Ministry of Energy will identify any Indigenous communities whose rights are potentially adversely affected by the proposed project, and assess the extent of necessary consultation.”
 - c. “If no duty to consult is triggered by the proposed project, the Ministry of Energy will provide a letter to the applicant confirming so within 25 business days of having been informed about the project by the applicant. This confirmation letter should be included by the applicant as part of the evidence supporting its application.”
 - d. “If the Ministry of Energy determines that a duty to consult is triggered, it will expressly delegate the procedural aspects of consultation to the applicant. Depending on the Crown’s assessment of the planned project, the Ministry of Energy will delegate the procedural aspects of consultation to the applicant by way of a Delegation Letter, a Memorandum of Understanding (MOU), or other express delegation instrument.”

⁴ 1.3 Ontario Pipeline Coordinating Committee, Environmental Guidelines, pages 7-8.

⁵ See e.g. page 33 of the Environmental Guidelines: “In addition, an Indigenous community may claim that a project may affect a site of Indigenous cultural significance.”

⁶ 3.3 Indigenous Consultation, Environmental Guidelines, pages 16-17.

- e. “The MOU or Delegation Letter will include the list of First Nation and Métis communities whose rights are potentially adversely affected by the planned project, direction on the respective roles and responsibilities of the applicant and Crown, and the requirements the applicant must satisfy in order to assist the Ministry of Energy in addressing the Crown’s duty to consult.”
 - f. “Within 25 days of the Ministry of Energy having been informed of the project by the applicant, the Ministry of Energy will issue the Delegation Letter or MOU or other express delegation agreement to the applicant.”
10. Please advise why the Environmental Guidelines review how an applicant has addressed or accommodated rights-based issues where the prescribed engagement/consultation process, including but not limited to the Environmental Guidelines, does not delegate substantive engagement obligations.
11. In the context of OEB commissioners assessing the sufficiency of engagement with Indigenous peoples by way of the Environmental Guidelines, please advise whether OEB commissioners review the lawfulness of a determination made by the Minister of Energy in relation to whether duties are owed to Indigenous peoples in response to a claim that a project may affect a site of Indigenous cultural significance.

Interrogatory # 6-HDI-3

Reference: Exhibit F, Schedule 1, pages 58-61

Questions:

1. In the context of the OEB’s obligation to uphold the honour of the Crown, please provide details of the OEB’s prima facie assessment of Haudenosaunee rights and interests in respect of EB-2022-0012.
2. Please describe the Crown’s efforts in respect of justification and engagement regarding EB-2022-0012 as it relates to the Haudenosaunee, HCCC, and HDI.
 - a. Please provide any documentation supporting same.
3. Please describe the OEB’s efforts in respect of justification and engagement regarding EB-2022-0012 as it relates to the Haudenosaunee, HCCC, and HDI.
 - a. Please provide any documentation supporting same.
4. Please describe whether and how the Crown has fulfilled the obligation to justify infringement which includes, in part, the obligation to undertake substantive aspects of consultation and engagement.
 - a. Please provide any documentation supporting same.
5. Please describe whether and how the Crown has retained oversight over all aspects of the process for fulfilling the Crown’s duty regarding EB-2022-0012.
 - a. Please provide any documentation supporting same.
6. Please describe the Crown’s engagement and/or consultation efforts with the Haudenosaunee, HCCC, or HDI undertaken in respect of the planning, construction, and operation of Sun-Canadian’s pipeline.
 - a. Please provide any documentation supporting same.
7. Please describe the OEB’s engagement and/or consultation efforts with the Haudenosaunee, HCCC, or HDI undertaken in respect of the planning, construction, and operation of Sun-Canadian’s pipeline.

- a. Please provide any documentation supporting same.
8. Please advise whether the Crown or the OEB has ever engaged with or consulted the Haudenosaunee, HCCC, or HDI in respect of the planning, construction, or operation of Sun-Canadian's pipeline.
9. Please describe the OEB's engagement process, including any specifics on how the OEB justifies infringements to established rights and interests.
 - a. Please provide any documentation supporting same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2022.

GILBERT'S LLP

Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Tim Gilbert
Jack MacDonald
Jonathan Martin

Tel: 416.703.1100
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