



Sun-Canadian Pipe Line Company Limited

Application for leave to construct the NPS 12 East Sixteen Mile Creek Pipeline Replacement Project in the Town of Milton, Ontario

PROCEDURAL ORDER NO. 3
April 18, 2022

Sun-Canadian Pipe Line Company Limited (Sun-Canadian) applied to the Ontario Energy Board (OEB) on January 17, 2022, under sections 90(1) and 97 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), for an order granting leave to construct approximately 480 meters of 12-inch pipeline in the vicinity of the East Sixteen Mile Creek crossing, in the Town of Milton, Ontario (the Project). Sun-Canadian has also applied to the OEB for approval of the form of land-use agreements it offers to landowners for the routing and construction of the proposed pipeline.

In Procedural Order No. 1, the OEB approved the Haudenosaunee Development Institute (HDI) as an intervenor that is eligible to apply for an award of costs. The OEB required HDI to file a letter providing more information on the areas HDI's evidence is expected to cover, whether an expert will be retained, the estimated cost of preparing the evidence and the proposed timing for filing the evidence, and any other relevant information (Evidence Letter). Procedural Order No. 1 also made provision for the filing of written interrogatories and interrogatory responses on Sun-Canadian's evidence.

In Procedural Order No. 2, the OEB granted a request from HDI for an extension to the deadlines for filing the Evidence Letter to April 8, 2022, and for the filing of interrogatories by HDI on Sun-Canadian's evidence to April 12, 2022. The OEB also granted Sun-Canadian's requested extension to file interrogatory responses to April 25, 2022.

HDI filed its Evidence Letter on April 8, 2022. HDI indicated that it expects its evidence 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
 - iv. United Nations Declaration on the Rights of Indigenous Peoples Act
- d. Harm to advancing the goals of reconciliation

3. Sun-Canadian, OEB, and Crown engagement with the Haudenosaunee, Haudenosaunee Confederacy Chiefs Council, and HDI in respect of the pipeline to date, including mitigation and compensation to address the above harms and interference with treaty rights.

HDI proposed to file its evidence within one month of receiving interrogatory responses from Sun-Canadian.

HDI also proposed to submit interrogatories to both Sun-Canadian and to the OEB. HDI indicated that it had not received information relating to how the OEB plans to discharge its substantive duties to engage.

On April 13, 2022, Sun-Canadian filed a letter with the OEB responding to the Evidence Letter. Sun-Canadian expressed concern that the proposed timing of HDI's evidence (and associated interrogatories or other discovery) could postpone the construction of the urgently needed Project to July 2023 (instead of the summer of 2022, which is the current intention). This would require Sun-Canadian to undertake several short-term mitigation measures to stabilize and protect the pipeline infrastructure, and require emergency permits from both Federal and Provincial agencies. Sun-Canadian stated that a delay could also result in significant financial risks with respect to purchasing materials and retaining contractors. Sun-Canadian further noted that the proposed evidence described in the Evidence Letter was in general in nature and may not be directly or necessarily related to the application.

The OEB's process with respect to the duty to consult

The public notice for this proceeding was issued on February 10, 2022, with a letter of direction to Sun-Canadian setting out the requirements for service.

Procedural Orders 1 and 2 include a schedule for filing interrogatories on the evidence of the applicant Sun-Canadian. The interrogatory process is an opportunity for parties to engage in further discovery of the evidence filed in a proceeding by posing written

questions to the party that has filed the evidence. The OEB will not be making provision for HDI or any other party to file interrogatories of the OEB. As the statutory decision maker with respect to this application; the OEB is not a party to the proceeding.

The OEB has a process to ensure that concerns related to the Crown's duty to consult (and, where required, accommodate) are considered in its hydrocarbon pipeline leave to construct proceedings. The OEB's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario set out the requirements that applicants must fulfil with respect to Indigenous consultation for leave to construct projects. This includes the filing of an Indigenous consultation report which describes the consultation activities that were undertaken, copies of communications and a summary of any rights-based concerns raised by Indigenous communities, and a description of what (if any) accommodations were proposed. The purpose of these requirements – in conjunction with interrogatory responses related to that evidence, any additional evidence filed by other parties, and final argument - is to provide the OEB with a record sufficient to allow it to determine if the duty to consult has been adequately discharged prior to it issuing a decision on the application. HDI (and any other party to the proceeding) can file interrogatories to the applicant with respect to consultation for the Project, and the responses to these interrogatories will also form part of the evidentiary record.

The Ministry of Energy also plays a role by identifying potentially impacted Indigenous communities, formally delegating procedural aspects of consultation to the applicant, and providing an opinion letter to the applicant (which is also filed with the OEB by the applicant) expressing its views on the adequacy of Indigenous consultation by the applicant.

The OEB is assisted in its review by the Ministry opinion letter. However, the OEB retains the responsibility to ensure that the duty to consult, where triggered has been adequately discharged with respect to a project before it can issue an approval.

To the extent that HDI raises concerns regarding the adequacy of consultation with respect to the Project, the OEB will consider these concerns and make a determination based on the record that is before it.

HDI's proposed evidence

The April 8 letter from HDI includes a high-level description of the evidence that HDI proposes to file, as well as an estimate of the cost of this evidence. The evidence filed should directly relate to the matters that are before the OEB in this proceeding – i.e., the discrete Project for which the applicant is seeking approval.

The Project is “the replacement of approximately 480 metres (m) of existing pipeline in the vicinity of the East Sixteen Mile Creek crossing with a new section of pipe – to be installed at a depth that will eliminate three existing areas of shallow depth of cover. Once the new segment of pipeline is installed, the existing segment will be decommissioned by cutting out / isolating it from the new pipeline alignment, removing any remaining product within the pipeline segment, capping of the segment, and filling it with concrete”.¹ The applicant proposes to install the new segment using horizontal directional drilling.

Evidence related to the duty to consult should address the Aboriginal or treaty rights of the Haudenosaunee that may be directly impacted by the Project described above, along with a description of those impacts. The OEB will not consider matters that do not relate directly to the impacts of this Project itself on Aboriginal or treaty rights. To the extent that the filed evidence goes beyond the impacts of the Project, the OEB may deny a costs claim.

In this Procedural Order, the OEB is establishing timelines for the filing of HDI’s evidence and written interrogatories on this evidence.

Request for an oral component to the hearing

HDI has requested an opportunity for oral interrogatories. The OEB has established an interrogatory process for the filed evidence in this proceeding. As described in the OEB’s Rules of Practice and Procedure, interrogatories are a written process. The OEB notes that HDI has already filed its interrogatory requests. Oral interrogatories will not be necessary.

The OEB has considered HDI’s request for an oral hearing. The OEB is of the view that an oral hearing is probably not necessary in the context of this application and that HDI will be able to adequately address the concerns it may have in relation to the proposed 480 metres of pipe replacement in its written evidence and written submissions. However, the OEB will review the matter once IR responses have been filed.

It is necessary to make provision for the following matters related to this proceeding.

Further procedural orders may be issued by the OEB.

¹ Exhibit A, Tab 1, Schedule 3, paragraph 3

IT IS THEREFORE ORDERED THAT:**Intervenor Evidence**

1. HDI shall file in writing with the OEB and deliver to all parties any evidence which is within the scope of the proceeding, no later than **May 6, 2022**.

Interrogatories on Intervenor Evidence

1. If Sun-Canadian or OEB staff seek information from HDI that is in addition to the evidence filed with the OEB and that is relevant to the hearing, they shall request the information by means of written interrogatories filed with the OEB and delivered to all parties by **May 13, 2022**. All interrogatories and responses must include a specific reference to the evidence on which the interrogatory is based.
2. HDI shall file with the OEB complete written responses to all interrogatories and serve them on all parties by **May 25, 2022**.
3. Sun-Canadian shall file its argument in chief by **June 1, 2022**.
4. HDI and OEB staff shall file any submissions they have by **June 8, 2022**.
5. Sun-Canadian shall file any reply submissions it has by **June 15, 2022**.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2022-0012** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [Filing Systems page](#) on the OEB's website
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance

- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar at the address below and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at judith.fernandes@oeb.ca and OEB Counsel, Michael Millar at michael.millar@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto, April 18, 2022
ONTARIO ENERGY BOARD

Nancy Marconi
Registrar