

April 26, 2022

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

Dear Ontario Energy Board Registrar,

Re: Procedural Order No. 3 – Ontario Energy Board 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. 3, dated April 18, 2022. In particular, HDI takes issue with the OEB’s refusal to answer written interrogatories and failure to engage with HDI in respect of deadlines in the proceeding.

The OEB’s Duty to Engage

The duty to engage with Indigenous peoples is grounded in the honour of the Crown and the protection provided for existing aboriginal and treaty rights in subsection 35(1) of the *Constitution Act, 1982*.¹ The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights and contemplates conduct that might adversely affect those rights.² The duty reflects the need to avoid the impairment of rights caused by the implementation of a specific project.³

In this context, any distinction between the Ontario Energy Board (“**OEB**”) and the Crown is immaterial. The OEB is the vehicle through which the Crown exercises its executive powers authorized by the *Ontario Energy Board Act, 1998*. A decision of the OEB constitutes Crown action that may trigger the duty to engage.⁴ It is the OEB, therefore, that must uphold the honour of the Crown.

¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32.

² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.

³ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 487.

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

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 in the Town of Milton, Ontario. This approval process triggered the duty to engage Indigenous peoples.⁵

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.⁶ Substantive aspects of the duty to engage, however, remain with the Crown and the OEB, as the honour of the Crown cannot be delegated.⁷ Indeed, in its July 28, 2020 letter to Sun-Canadian, the Ministry acknowledged 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.”⁸

In ostensible satisfaction of its duty to engage, the OEB has established “a process to ensure that concerns related to the Crown’s duty to consult (and, where required, accommodate) are considered”.⁹ The OEB references its Environmental Guidelines¹⁰ for the requirements that applicants must fulfill with respect to Indigenous engagement for leave to construct projects.

When the Crown relies on a regulatory process to fulfill the duty to consult, however, such reliance is not delegation of the Crown’s ultimate responsibility to ensure engagement is adequate.¹¹ Despite its “processes”, the duty to engage remains with the OEB.

The OEB also plays an oversight role in assessing whether the duty to engage has been fulfilled.¹² In Procedural Order No. 3, the OEB assured the parties that it “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.”¹³

In short, the OEB has assumed the role of perpetrator, judge, and jury, in that it: 1) has a duty to engage with Indigenous peoples on matters affecting Indigenous rights and interests (as set out by the Supreme Court of Canada); 2) determines the process by which that duty is fulfilled; and 3) assesses whether the duty has in fact been fulfilled.

The OEB’s Actions to Date

On April 8, 2022, pursuant to Procedural Order No. 2, HDI filed a letter with the OEB regarding its expected evidence in the proceeding. In its letter, HDI informed the Board that it intended on

⁵ 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>; also see *Clyde River (Hamlet) v Petroleum Geo Services Inc*, 2017 SCC 40 at para 27.

⁶ See letter from Ministry of Energy, Northern Development and Mines to Sun-Canadian, dated July 28, 2020.

⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53.

⁸ Letter from Ministry of Energy to Sun-Canadian, dated July 28, 2020, SCPL_APPL_LTC_20220117, PDF page 248.

⁹ Procedural Order No. 3 in EB-2022-0012, dated April 18, 2022.

¹⁰ Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2019-01/Environmental-Guidelines-HydrocarbonPipelines-20160811.pdf>.

¹¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53.

¹² See e.g. consultation with Indigenous Peoples, <https://www.oeb.ca/stakeholder-engagement/consultation-indigenous-peoples>; Ontario Energy Board Notice for Leave to Construct Application EB-2022-0012, dated February 17, 2022.

¹³ Procedural Order No. 3 in EB-2022-0012, dated April 18, 2022.

delivering written interrogatories to the OEB regarding the OEB's engagement policies and processes. These written interrogatories were delivered to the OEB on April 12, 2022.

In Procedural Order No. 3, the OEB refused to respond to these written interrogatories, stating that it will not be making provision for HDI to file interrogatories of the OEB.¹⁴

This outright refusal denies the Haudenosaunee a meaningful opportunity to engage with the OEB. Engagement is meaningless when it excludes from the outset any form of accommodation.¹⁵ The OEB is relying on its role as "statutory decision maker" to ignore legitimate concerns regarding its process. Despite the OEB's assurances that it is "committed to ensuring that Indigenous peoples [...] have an opportunity to bring forward their concerns and to participate",¹⁶ its refusal to answer interrogatories belies its commitment to meaningful engagement.

In stark contrast to the one month timeline requested by HDI, the Order then set down a deadline for HDI's delivery of evidence, a mere 11 days after responses to written interrogatories are received. This impractical timeline is apparently based on, or at the very least influenced by, a letter filed by Sun-Canadian on April 13 in which "concerns", supported without evidence, were expressed relating to "financial risks", including "purchasing materials" and "retaining contractors".¹⁷

Good faith negotiation is required on both sides in the engagement process.¹⁸ The OEB, however, did not consult HDI in respect of this deadline, effectively ignoring HDI's request in favour of Sun-Canadian's unsubstantiated concerns. Such a one-sided consideration of the parties' positions, *i.e.*, basing an order solely on the concerns of Sun-Canadian, does not demonstrate good faith negotiation in the engagement process.

The OEB's derogation of its engagement duties triggered by EB-2022-0012 underscores the conflict of interest in the OEB's processes. As the entity that 1) holds the duty to engage, 2) sets the standards by which sufficiency of engagement is measured, and 3) decides whether the standards have been met, the OEB is effectively infallible. Rhetorically speaking, in what world would the OEB deny a proponent's application on the basis of its own failure to fulfill its substantive duties to engage?

The OEB's refusal to answer questions regarding its Indigenous engagement processes reinforces their unassailable nature. Processes that were developed and implemented absent Indigenous engagement are firmly entrenched and shielded from criticism.

Next Steps

Procedural Order No. 3 is dismissive of the OEB's duty to engage and the goals of reconciliation. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Indigenous peoples with respect to the interest at stake.¹⁹ In order to answer this question, HDI is willing to discuss the OEB's decision

¹⁴ Procedural Order No. 3 in EB-2022-0012, dated April 18, 2022.

¹⁵ 2005 SCC 69 at para 54.

¹⁶ <https://www.oeb.ca/stakeholder-engagement/consultation-indigenous-peoples>.

¹⁷ Procedural Order No. 3 in EB-2022-0012, dated April 18, 2022.

¹⁸ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53.

¹⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 45.

with respect to the May 6 evidence deadline at its earliest convenience. HDI is also willing to discuss the OEB's engagement processes more generally at a later date.

We would ask the OEB to reconsider Procedural Order No. 3, and would be pleased to speak to this matter at the Board's convenience.

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