



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. 4
April 29, 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.

Sun-Canadian Pipe Line Company Limited (Sun-Canadian) operates an NPS12 pipeline which is used to transport refined petroleum products from refineries in Sarnia to plants in London, Hamilton, and Toronto. Through its application filed January 17, 2022, Sun-Canadian seeks approval to construct and operate a new 480 metre section of pipeline to replace a portion of the existing line that has become exposed in the East Sixteen Mile Creek in the Town of Milton. The new section would be constructed using horizontal directional drilling to install it deeper below the creek. The existing section would be decommissioned by isolating it, removing any remaining product from it, capping it, and filling it with concrete.

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

The Haudenosaunee Development Institute (HDI) filed its request for intervenor status on March 7, 2022. The request for intervenor status included a request to file evidence.

On March 22, 2022, the OEB issued Procedural Order No. 1 confirming that HDI is approved as an intervenor and is eligible to apply for an award of costs under the OEB's Practice Direction on Cost Awards.

Procedural Order No. 1 required HDI to file a letter with the OEB by April 1, 2022 providing more information on the areas HDI's evidence expected to cover, whether an expert would 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 on April 5, 2022 and April 18, respectively.

On March 31, 2022, Sun-Canadian filed a letter regarding an extension to the date for the filing of the Evidence Letter by HDI. Sun-Canadian stated that it had met with HDI on March 29, 2022, and further to that meeting and in response to a request from HDI, Sun-Canadian advised it was willing to consent to an extension to the deadline for HDI to file the Evidence Letter to April 8, 2022.

On April 1, 2022, HDI contacted the OEB confirming the request for an extension to file the Evidence Letter and also requested an extension of time to April 12, 2022 to file written interrogatories on Sun-Canadian's evidence. HDI stated that the preparation and scope of written interrogatories was contingent on the expected evidence to be set out in the Evidence Letter and therefore a few days' time was required to draft the written interrogatories after submission of the Evidence Letter.

On April 5, 2022, Sun-Canadian informed the OEB that it consented to the extension to the deadline for HDI to file written interrogatories to April 12, 2022. Sun-Canadian also requested an extension to the deadline to file interrogatory responses to April 25, 2022, as a result of HDI's extension on filing written interrogatories

Procedural Order No. 2 was issued on April 6, 2022 approving the extensions requested by HDI and Sun-Canadian.

HDI filed the Evidence Letter on April 8, 2022, outlining the evidence it proposed to file. In that letter, HDI described the project as "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."

HDI described its proposed evidence as follows:

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.

However, HDI provided few specific details on what “significant concerns relating to the proposed pipeline replacement” it had.

On April 12, 2022, HDI filed two sets of interrogatories. The first related to Sun-Canadian’s evidence. The second were directed to the OEB itself.

On April 18, 2022, the OEB issued Procedural Order No. 3, in which the OEB described its process, as a statutory decision-maker, to the duty to consult.

The OEB also encouraged HDI to focus its evidence on the matter before the OEB so that the OEB would be in a position to determine to what extent if any, the replacement of 480 metres of an existing pipeline would have an impact on constitutionally protected Aboriginal or treaty rights of the Haudenosaunee.

The OEB also stated that it would not be responding to interrogatories itself since the interrogatory process only applied to evidence filed by parties appearing before the OEB, and that the OEB is the statutory decision maker and not a party to the proceeding.

In a letter dated April 26, 2022, HDI expressed concern with the OEB’s approach to the duty to consult. The OEB is of the view that it is proceeding in a manner that is consistent with the Crown’s duty to consult. The OEB understands that its decisions can constitute Crown conduct that triggers the duty to consult. As noted by the Supreme Court of Canada, the Crown may rely on the regulatory processes of tribunals to fulfill the duty to consult under certain circumstances: in particular where 1) the tribunal’s procedural powers allow it to implement consultation by hearing from potentially impacted Indigenous groups, and 2) the tribunal’s remedial powers allow it to, where necessary, accommodate affected Aboriginal or treaty rights.¹

The OEB’s process, as described more fully in Procedural Order No. 3, is ongoing and will be informed by both the existing record and any evidence HDI brings forward

¹ *Clyde River (Hamlet) v. Petroleum Geo-services Inc.*, 2017 SCC 40, para. 34, *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, para. 32

regarding the impact the proposed replacement of a 480 metre portion of an existing pipeline may have on the constitutionally protected rights of the Haudenosaunee.

As noted above, HDI has not yet provided details about what aspects of the proposed project are of concern in relation to the constitutionally protected rights of the Haudenosonee.

Consistent with the OEB's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, the process of consultation began with a letter from the Ministry of Energy, Northern Development and Mines to the applicant, dated July 28, 2020, a year and eight months ago. In that letter, the Ministry stated:

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.

The Ministry provided the applicant with a list of three communities - Mississaugas of the New Credit First Nation, Six Nations of the Grand River, and Huron Wendat. Regarding Six Nations of the Grand River, the Ministry's letter advised that the applicant was required to consult with both the Six Nations Elected Council and Haudenosaunee Confederacy Chiefs Council, and that HDI was to be copied on all correspondence with the Haudenosaunee Confederacy Chiefs Council.

Sun-Canadian's evidence includes a consultation record which includes the Project information that was provided to the Indigenous communities and HDI. This includes records of meetings that took place with representatives of Mississaugas of the New Credit First Nation, Six Nations of the Grand River, and Huron Wendat.

In response to an HDI interrogatory 4-HDI-2 which asked "Did Stantec engage with the Haudenosaunee in preparing the Environmental Report?", Sun-Canadian provided the following reply:

As shown in Appendix Staff-9-1, Sun Canadian contacted HDI/HCCC [Haudenosaunee Confederacy Chiefs Council] on the following dates to obtain input on the Environmental Report prepared by Stantec:

- a. August 12, 2020 – Letter and email correspondence inviting HDI/HCCC to provide comments and schedule a virtual meeting with Stantec for any day in September with the exception of September 28-30, 2020.
- b. September 16, 2020 – Follow up phone call and email correspondence from Sun Canadian requesting a meeting with HDI/HCCC on the following dates: September 21-25, 2020, October 21, 23, 24, 25, 2020.

- c. September 22, 2020 – Follow up email correspondence requesting a meeting with HDI/HCCC.
- d. October 9, 2020 – Follow up email correspondence proposing a meeting with HDI/HCCC on October 16, 2020.
- e. December 1, 2020 – Email correspondence requesting HDI/HCCC participation in the ecology surveys for the project.
- f. February 5, 2021 – Email correspondence requesting comments on a draft of the environmental report.
- g. October 22, 2021 – Email correspondence with HDI/HCCC enclosing the email from February 5, 2021 requesting input.

In Table Staff-9-2, Sun-Canadian states that it has “responded to all of HDI / HCCC’s information requests” and has “entered into an Environmental Monitoring Agreement effective January 24, 2022 and an Archeological Agreement effective March 7, 2022 with HDI.”

At this stage, the OEB would expect that HDI would have already identified, at least at a high level, its specific concerns about the impact of replacing 480 metres of an existing pipeline, in discussions with the applicant. To the extent that HDI’s concerns remain unaddressed, the OEB would expect that HDI should have been able to provide an overview of those concerns in the letter which was filed by HDI on April 8, 2022.

While noting the extensions already granted to HDI, the OEB will extend the date for HDI to file its evidence to May 13, 2022. With this extension, HDI will have five weeks from the date it filed the Evidence Letter to complete the preparation of its evidence. If Sun-Canadian failed to engage with HDI, the OEB expects HDI will address that in its evidence. If Sun-Canadian failed to address the specific concerns raised by HDI, the OEB expects HDI will address that in its evidence. If HDI believes that the Project may impact Aboriginal or treaty rights, the OEB expects HDI will provide evidence that identifies those rights and explains how they may be impacted.

The OEB will consider whether the proposed project has an impact on constitutionally protected rights based on the record before it, including any evidence provided by HDI. The OEB has significant remedial powers to address any impacts to Aboriginal or treaty rights. If there is an impact to these rights, the OEB will consider whether the Project should be approved, approved with conditions designed to accommodate any impacts, or denied, based on the evidentiary record.

The OEB also confirms that it will not be answering interrogatories itself, for the reasons provided in Procedural Order No. 3.

The dates for the remaining procedural steps will be adjusted accordingly.

In Procedural Order No. 3, the OEB stated it would further consider HDI's request for an oral hearing when interrogatory responses had been received. Now that Sun-Canadian has filed its responses to HDI's interrogatories, the OEB is of the view that an oral hearing is not necessary in the context of this application and that HDI will have sufficient opportunity to address the concerns it may have in relation to the proposed 480 metres of pipe replacement in its written evidence and written submissions. It is necessary to make provision for the following matters related to this proceeding.

Further procedural orders may be issued by the OEB.

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 13, 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 20, 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 **June 1, 2022**.
3. Sun-Canadian shall file its argument-in-chief by **June 8, 2022**.
4. HDI and OEB staff shall file any submissions they have by **June 15, 2022**.
5. Sun-Canadian shall file any reply submissions it has by **June 22, 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: 1-888-632-6273 (Toll free)

Fax: 416-440-7656

DATED at Toronto, April 29, 2022
ONTARIO ENERGY BOARD

Nancy Marconi
Registrar