

John A.D. Vellone
T (416) 367-6730
F (416) 367-6749
jvellone@blg.com

Colm Boyle
T (416) 367-7273
F (416) 367-6749
cboyle@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada M5H 4E3
T 416.367.6000
F 416.367.6749
blg.com



June 8, 2022

Delivered by Email & RESS

Ms. Nancy Marconi, Registrar
Ontario Energy Board
PO Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Sun-Canadian Pipe Line Limited's Sections 90 and 97 Application for Leave to Construct
Argument in Chief of Sun-Canadian Pipe Line Limited
Ontario Energy Board File No.: EB-2022-0012**

Further to Procedural Order No. 4 dated, April 29, 2022 please find enclosed the Argument in Chief of Sun-Canadian Pipe Line Limited ("Sun-Canadian").

If you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in black ink, appearing to read 'Colm Boyle', is written over a horizontal line.

Colm Boyle

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B), as amended;

AND IN THE MATTER OF an Application by Sun-Canadian Pipe Line Company Limited under sections 90(1) and 97 of the Act 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

AND IN THE MATTER OF an application by Sun-Canadian Pipe Line Company Limited under section 97 of the OEB Act for approval of the proposed form of easement agreements included herein.

ARGUMENT-IN-CHIEF OF SUN-CANADIAN PIPE LINE COMPANY LIMITED

June 8, 2022

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide St W Suite 3400
Toronto, ON M5H 4E3

John A.D. Vellone
Tel: 416.367.6730
JVellone@blg.com

Colm Boyle
Tel: 416.367.7273
CBoyle@blg.com

Counsel for Sun-Canadian Pipe Line Company Limited

I. OVERVIEW

1. Sun-Canadian Pipeline Limited (“**SCPL**”) makes these submissions in support of its application to the Ontario Energy Board (the “**OEB**”) for:
 - a. an order granting leave to construct an approximately 480 metre portion of existing privately owned NPS12 pipeline that has been exposed at East Sixteen Mile Creek in the Town of Milton (the “**Project**”) pursuant to section 90 of the *Ontario Energy Board Act, 1998* (the “**Act**”);¹ and
 - b. an order approving the forms of easement agreement related to the construction of the Project pursuant to section 97 of the Act.²

(together the “**Application**”)
2. The Project is a replacement of approximately 480 metres (m) of an existing 12” 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.³ Only 0.14 ha (0.35 acres) of new permanent easement is required for the Project.⁴
3. The pipeline is crucial infrastructure that supplies refined fuel products from refineries in the Sarnia area to marketing plants in London, Hamilton and Toronto areas. The SCPL pipeline also supplies a significant amount of jet fuel to Toronto Pearson International Airport.⁵
4. The Project does not increase capacity or improve operational efficiencies. The only driver of the Project is to eliminate the identified pipeline integrity concern to ensure continued safe, reliable and environmentally responsible operation of the pipeline.⁶
5. SCPL submits that the construction of the Project is in the public interest. SCPL submits that it has demonstrated that there is a need for the Project and that it has provided the OEB with sufficient information regarding the Project’s environmental impacts, the Project’s impacts on owners of land, and Indigenous consultation, such that the OEB should, accordingly, grant leave to construct, subject to the conditions of approval proposed by OEB Staff and SCPL.⁷

¹ *Ontario Energy Board Act, 1998*, SO 1998, c. 15, Sched. B [Act].

² EB-2022-0012, Application for Leave to Construct (January 17, 2022) [Application].

³ Application, Exhibit A, Tab 1, Schedule 3, page 1.

⁴ Application, Exhibit E, Tab 1, Schedule 1, page 3.

⁵ EB-2022-0012, SCPL IR Responses (April 25, 2022), Staff-1(3) [SCPL IR Responses].

⁶ SCPL IR Responses, Staff-1(2).

⁷ SCPL IR Responses, Staff-10.

6. SCPL also submits that it meets the requirements of section 97 of the Act by having offered or will offer to each owner of land affected by the approved route or location an agreement in the form attached at Appendix Staff-7-2. SCPL respectfully requests that the form of easement be approved by the OEB.

II. ARGUMENT

Background

7. In June 2020, SCPL introduced the Project to various Indigenous groups and noted that it intended to apply to the OEB for approval, which involved notification to the Ministry of Energy, Northern Development and Mines ("**MENDM**"), as it then was.⁸
8. On July 28, 2020, MENDM issued a consultation letter stating that the following Indigenous communities should be consulted on the Project: Mississaugas of the New Credit First Nation ("**MCFN**"), Six Nations of the Grand River ("**SNGR**"), Huron Wendat ("**HWFN**") and Haudenosaunee Confederacy Chiefs Council ("**HCCC**") (collectively the "**Indigenous Communities**").⁹ Haudenosaunee Development Institute ("**HDI**") was to be copied on all correspondence to HCCC.
9. In August 2020, SCPL kicked off its consultation program with owners of land, municipalities, agencies, Indigenous Communities, government agencies and other interested parties. The consultation program included a notice in a local newspaper, letters, emails and virtual meetings.¹⁰ SCPL developed a project webpage to provide project details and communications to interested and potentially affected parties.¹¹ SCPL initially anticipated that construction of the Project could begin as early as summer 2021 and be completed by the end of 2021.¹² A summary of the input received from consultation activities with these public communities and Indigenous Communities are found at Exhibit F, Exhibit G, Appendix 1 and 2 of the Application and SCPL's interrogatory responses.
10. Between September 2020 and October 2020, SCPL met with MCFN, SNGR and HWFN to solicit input on the environmental report. HCCC and HDI did not respond to repeated invitations by SCPL to meet or engage.¹³
11. In November and December 2020, SCPL invited the Indigenous Communities to participate in the Stage 1 Archaeological Assessment and habitat studies. HCCC and HDI reviewed and replied to a draft of the Stage 1 Archaeological Assessment, which was provided to Indigenous Communities in December 2020, stating that it did not have any comments.¹⁴

⁸ SCPL IR Responses, Staff-9(1).

⁹ Application, Appendix 2, page 9.

¹⁰ Application, Appendix 1, page 7.

¹¹ Application, Appendix 2, page 12; A summary of the input received is found at page 23.

¹² Application, Appendix 2, page 65.

¹³ SCPL IR Responses, 4-HDI-2(1).

¹⁴ SCPL IR Responses, Staff-9(1).

12. In February 2021, the Indigenous Communities were sent a draft of the ER and SCPL requested comments.¹⁵ This correspondence stated that construction on the Project could begin as early as summer 2022 and be completed by the end of 2022, subject to approval by the OEB. HCCC and HDI did not provide any comments on the ER.
13. In May and June 2021, SCPL invited Indigenous Communities to participate in the Stage 2 Archaeological Assessment. HDI attended and actively engaged in the field study but no concerns were raised. HCCC and HDI did not have any comments on the draft Stage 2 Archaeological Assessment provided to Indigenous Communities in June 2021.
14. On January 17, 2022, SCPL filed the Application, including the environmental report (“ER”), consistent with the process outlined in the *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario* (the “**Environmental Guidelines**”).¹⁶ The principle objective of the ER was to identify an environmentally preferred route and outline various environmental mitigation and protection measures for the construction and operation of the Project while meeting the intent of the OEB’s Environmental Guidelines.¹⁷
15. On February 10, 2022, the OEB issued a Notice describing SCPL’s Application and providing an opportunity for interested persons to participate in the OEB’s hearing.¹⁸ Notice of the Application was served on interested parties via registered mail throughout February 2022.¹⁹
16. On March 7, 2022, HDI applied as an intervenor in this proceeding pursuant to Rule 22 of the OEB *Rules of Practice and Procedures* (the “**Rules**”).²⁰ HDI also sought eligibility for a cost award. SCPL did not object to either HDI’s requested intervention or to its eligibility for a cost award.
17. On March 22, 2022, the OEB issued Procedural Order No. 1²¹ 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.²²
18. On April 6, 2022, the OEB issued Procedural Order No. 2 wherein 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

¹⁵ Application, Exhibit F, Tab 1, Schedule 2, page 3.

¹⁶ Ontario Energy Board, *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario*, 7th ed (2016) [Environmental Guidelines].

¹⁷ Application, Appendix 1, page 2.

¹⁸ EB-2022-0012, Notice (February 10, 2022).

¹⁹ EB-2022-0012, Affidavits of Service (March 1, 2022).

²⁰ Ontario Energy Board, *Rules of Practice and Procedure*, r. 22.03.

²¹ EB-2022-0012, Procedural Order 1 (March 22, 2022) [Procedural Order 1].

²² Procedural Order 1.

Sun-Canadian's requested extension to file interrogatory responses to April 25, 2022 as a result of the HDI extension. SCPL consented to HDI's extension request.²³

19. On April 8, 2022, HDI filed a high-level description of the evidence that HDI proposed to file, as well as an estimate of the cost of this evidence.²⁴
20. On April 12, 2022, HDI filed interrogatories on SCPL's application and evidence.²⁵ SCPL provided detailed responses to HDI's interrogatories on April 25, 2022.²⁶
21. On April 18, 2022, the OEB issued Procedural Order No. 3 granting HDI to file Intervener Evidence and encouraged HDI to focus its evidence on the matter before the OEB:²⁷

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”.

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. [Emphasis added]

22. On April 29, 2022, the OEB issued Procedural Order No. 4 granting HDI an extension to file Intervener Evidence and reiterated its expectations in respect of such evidence:²⁸

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 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.

²³ EB-2022-0012, Procedural Order 2 (April 6, 2022).

²⁴ EB-2022-0012, HDI Evidence Letter (April 8, 2022).

²⁵ EB-2022-0012, HDI Interrogatories to Applicant (April 12, 2022) [HDI Interrogatories].

²⁶ EB-2022-0012, Interrogatory Response to HDI (April 25, 2022) [SCPL Response to Interrogatories].

²⁷ EB-2022-0012, Procedural Order 3 (April 18, 2022).

²⁸ EB-2022-0012, Procedural Order 4 (April 29, 2022).

[...]

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. [Emphasis added]

23. On May 13, 2022, HDI filed its evidence, which included affidavits from Mr. Aaron Detlor, Mr. Richard Wayne Hill Sr. and Mr. Aidan Hollis.²⁹ SCPL and OEB staff filed interrogatories on HDI's evidence on May 20, 2022.³⁰ HDI provided responses to those interrogatories on June 1, 2022.³¹ HDI confirmed that it intends to seek a cost award to financially support its participation in this Application, and that HDI is eligible for recovery of costs associated with both legal counsel and third party consultants in accordance with the OEB's tariff.

The Public Interest Test

24. Section 96 (1) of the Act states that after the OEB considers an application under section 90 or 91, if it is of the opinion that the proposed work is in the public interest, it shall make an order granting leave to construct the work. If the OEB is not satisfied that the proposed project is in the public interest, it will not approve the application.³²

²⁹ EB-2022-0012, HDI Evidence (May 13, 2022).

³⁰ EB-2022-0012, SCPL Interrogatories to HDI (May 20, 2022).

³¹ EB-2022-0012, HDI Interrogatory Response to SCPL and OEB Staff (June 1, 2022).

³² The Natural Gas Facilities Handbook, page 22.

25. Section 97 of the Act states that leave to construct shall not be granted until the applicant satisfies the OEB that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the OEB.
26. While “public interest” is not defined in the Act, the OEB’s approach in determining whether a Project is in the public interest generally involves an assessment of the Project in light of the OEB’s statutory objectives which for gas facilities can be found in Subsection 1(2) of the *Ontario Energy Board Act, 1998*. This assessment typically involves an examination by the OEB of the following factors: (a) the need for the project; (b) the project cost and economics; (c) environmental impacts; (d) impacts on owners / land matters; and (e) Indigenous consultation.³³
27. The Natural Gas Facilities Handbook (“**Handbook**”) sets out the OEB’s expectations in relation to section 90 and 91 Leave to Construct Applications under the Act. At Appendix A of the Handbook, the OEB has developed a standard leave to construct issues list that is designed to capture all the issues that are within the scope of a typical leave to construct proceeding. SCPL will address each of these in turn.
28. SCPL’s approach to the Application has been, in part, guided by the OEB’s Decision and Order issued March 12, 2020 in EB-2019-0007 in respect of an application by Imperial Oil Limited for leave to construct the proposed Waterdown to Finch Project (the “**IOL Decision**”).

A. Need for the Project

- a. **Has the applicant demonstrated that the project is needed? What factors are driving the need (e.g., new customer demand, increased system capacity requirement, reliability of service, need for pipeline relocation, operational risks, integrity issues)? Has sufficient evidence demonstrating need been provided (e.g., customer or volumetric forecast, system capacity analysis, engineering reports)?**
29. The purpose of the pipeline is to transport refined petroleum products used by households and businesses in the London, Hamilton and Toronto areas, including supply of jet fuel for Toronto Pearson International Airport.
30. As stated above, the Project does not increase capacity or improve operational efficiencies. The only driver of the Project is to eliminate the pipeline integrity concern to ensure continued safe, reliable and environmentally responsible operation of the pipeline.
31. In 2019, SCPL identified three locations with low or no cover. One of these locations is fully exposed due to natural erosion caused by the meandering of East Sixteen Mile Creek (“**E16M**”).³⁴ In the spring of 2019, SCPL undertook emergency mitigation measures including in-water pipe supports and protective armouring to temporarily stabilize and protect the infrastructure.³⁵

³³ See e.g. EB-2019-0007, Decision and Order (March 12, 2020), page 5; EB-2018-0188, Decision and Order (July 11, 2019), page 3; EB-2018-0263, Decision and Order (July 11, 2019), page 5.

³⁴ SCPL IR Responses, Staff-1(1).

³⁵ Application, Exhibit B, Tab 1, Schedule 1, page 1.

32. The project is needed to maintain compliance with section 8 of O. Reg. 223/01. Under this regulation, SCPL is required to comply with CSA Z662-19 (Oil and Gas Pipeline Systems) which governs safety and integrity of the pipeline throughout its lifecycle. Section 4.11 of CSA Z662-19 sets out the depth of cover requirements that are intended to protect the pipeline against external loads, scour and third party damage. CSA Z662-19 recognizes that water crossings can be subject to erosion and Table 4.9 requires water crossings be buried to a depth of 1.2 metres.
33. For the project timing set out in Tables D.1.6-1 and D.1.6-2 of Exhibit D, SCPL assessed the risk of a loss of pipeline containment resulting from low or no depth of cover near E16M using two risk rating factors: (1) probability of occurrence; and (2) severity of consequence. SCPL concluded that the project is urgently needed due to the consequences if hydrocarbons are released into E16M watershed and the increased probability of loss of containment due to having exposed pipe in E16M.³⁶
34. The project will ensure safe and reliable long-term operation of the pipeline system as well as compliance with Technical Standards and Safety Authority regulations and the Canadian Standards Association Z662 standard. Timely repair will eliminate the potential environmental risk with having an exposed pipe in the E16M watershed.
- b. Has the applicant demonstrated how the project fits within any relevant growth plans for the area, the applicant's Utility System Plan (including any Asset Management Plan)? – e.g., what are the dependencies between the proposed project and previously approved LTC projects or in the case of a large project, between the proposed project and future phases of the project?**
35. This is not applicable to the Project.

B. Project Alternatives

- a. Has the applicant demonstrated that the identified need is best addressed by the proposed project, having adequately considered all viable alternatives (e.g., other pipeline, non-pipeline and hybrid solutions including integrated resource planning alternatives)?**
36. SCPL considered five alternatives, discussed below, for their technical feasibility to remediate the three locations with low or no cover. Only the “in-water remediation” and the “line replacement by horizontal directional drilling” have high technical feasibility to address the identified need.³⁷
37. The route selection process was undertaken in accordance with the Environmental Guidelines, which identify the environmental and socio-economic features, and the routing principles, to be considered.

³⁶ Application, Appendix 1, Appendix B1, page 2.

³⁷ SCPL IR Responses, Staff-2(2).

38. The pipeline routing constraints present are residences, businesses, engineering and constructability, and environmental features such as E16M, riparian areas adjacent to E16M and aquatic species at risk in the creek.³⁸ SCPL also considered re-routing its pipeline, however the environmental, economic and safety implications of re-routing an existing pipeline made the option infeasible.³⁹

39. The proposed pipeline replacement parallels the existing pipeline, utilizing a combination of proposed new easement and existing easement. The drill entry and exit points are located within the existing easement. The drill path is located within both the existing easement and the proposed new easement. The location of the replacement pipeline was determined by considering the confines of available space and the tie-in locations to the existing pipeline. Routing also considered socio-economic constraints, environmental considerations, and constructability while utilizing the most reasonably direct route.⁴⁰

40. Input on the preferred route was sought through consultation. No feedback was received that resulted in a revision to the preferred route location.⁴¹

b. Has the applicant compared the alternatives using appropriate metrics including costs, benefits, risks, economic feasibility (Profitability Index, Net Present Value), timing, reliability, safety, land use requirements, permitting requirements, environmental impacts, and impacts on (amongst others) Indigenous peoples and their rights, municipalities and landowners?

41. SCPL considered five alternatives for the Project⁴²:

- a. *Do nothing*: SCPL would not take any action in response to the three locations with low or no cover.
- b. *Maintain temporary mitigation measures*: SCPL would operate the pipeline only using the mitigation measures that were installed in 2019 to temporarily stabilize and protect the pipeline infrastructure. These mitigation measures would be maintained on regular intervals.
- c. *Line lowering*: SCPL would dam and re-route E16M creek so that it could uncover the existing pipe using an open cut crossing method. The existing pipe would be mechanically lowered to an acceptable depth and then reburied.
- d. *In-water remediation*: SCPL would dam and re-route E16M creek so that it could installed engineered facilities to protect the pipe and/or improve channel stability. This would

³⁸ Application, Appendix 1, page 19.

³⁹ SCPL IR Responses, 2-HDI-1.

⁴⁰ Application, Appendix 1, page 18.

⁴¹ Application, Appendix 1, page 20.

⁴² Application, Exhibit C, Tab 1, Schedule 1, pages 1 and 2.

include a combination of articulated concrete blocks, channel realignment, and bank armouring.

- e. *Line replacement by horizontal directional drilling (“HDD”)*:⁴³ HDD is a technique whereby a tunnel is drilled with electronically guided drilling pipe that is lubricated with a drilling fluid. The pipeline is then constructed on the surface and pulled through the tunnel. HDD is a less intrusive construction method than traditional open cut crossings of a watercourse.⁴⁴

42. SCPL compared the following metrics between the alternatives: safety, environmental impact, installation cost, technical feasibility, timing, reliability, land use, permitting, municipal impact and owners of land impacts.⁴⁵

43. SCPL concluded that while the line replacement by HDD is the highest-cost option, it provides the most effective long-term protection of the water crossing and requires the least amount of construction impact on the local environment, E16M, and impacted owners of land.⁴⁶ After the replacement pipeline segment is installed, the existing segment of NPS12 pipeline that is no longer required will be decommissioned. This will consist of the pipe being purged of product, capped, filled with concrete, deactivated and left in-place, following all relevant safety and technical standards.⁴⁷

C. Project Cost and Economics

44. The Handbook states that this section applies only to applicants that are or intend to become rate regulated and seek to include the project costs in a future rates application.

45. SCPL is a non-rate regulated, non-public entity. The cost of the proposed Project will be borne by SCPL. As such, SCPL submits that Project costs are not relevant to the public interest determination by the OEB in this instance.⁴⁸

46. This approach is consistent with the IOL Decision, where the OEB determined at page 5 that:

In this case, the OEB’s review does not include consideration of the Project cost and economics as Imperial Oil is not a rate-regulated entity, and the costs of the Project will therefore not be passed on to ratepayers through any OEB-approved rates.

⁴³ SCPL also considered, and rejected, the alternatives of an “open cut crossing method” and relocating the horizontal directional drilling entry pit as part of the HDD option. See Application, Appendix 1, section 2.3.

⁴⁴ Application, Appendix 1, pg. 31.

⁴⁵ SCPL IR Responses, Staff-2(2).

⁴⁶ SCPL IR Responses, Staff-2(3).

⁴⁷ Application, Exhibit B, Tab 1, Schedule 1, pg. 2.

⁴⁸ SCPL IR Responses, 5-HDI-1.

D. Environmental Impacts

- a. **Has the applicant filed an Environmental Report that meets the requirements of the OEB's Environmental Guidelines and appropriately identified the environmental impacts associated with construction of the project and adequately described how it intends to mitigate and manage these impacts?**

47. SCPL retained Stantec Consulting Ltd. ("**Stantec**") to prepare an ER in accordance with the Environmental Guidelines. The ER was filed with the Application.
48. The ER included the identification of a preferred route, a consultation program, an impact assessment, and a cumulative effects assessment.⁴⁹ The ER describes the investigated data on the physical, biophysical, and socio-economic environment along the proposed pipeline route.
49. Table 4-9 of the ER summarizes the recommended supplemental studies, mitigation and protective measures to address the potential impacts identified by Stantec.⁵⁰
50. Stantec concluded that with the implementation of the recommendations in the ER, on-going communication and consultation, and adherence to permit, regulatory and legislative requirements, potential adverse residual environmental and socio-economic impacts of the project are not anticipated to be significant.⁵¹
51. The ER has been distributed for review to all members of the Ontario Pipeline Coordinating Committee and affected parties such as municipalities, conservation authorities, provincial/federal agencies, owners of land and Indigenous Communities as required by the Environmental Guidelines.
52. SCPL documented issues and concerns raised in the consultation process in the Record of Consultation at Exhibit F, Exhibit G and interrogatory responses filed on April 25, 2022.
53. As set out in the Application, an Environmental Protection Plan ("**EPP**") and several management and contingency plans will be developed prior to construction. The EPP will outline the required environmental protection measures and commitments to avoid or reduce potential effects on the environment as a result of the Project. The EPP builds on the mitigation measures, monitoring and contingency plans identified within the ER. It will provide the overarching structure upon which environmental management will be completed during construction by identifying environmental requirements, compliance procedures, roles and responsibilities, training procedures, inspection and reporting structures, and other processes and procedures for environmental management.⁵²

⁴⁹ Application, Appendix 1, page 7.

⁵⁰ See HDI Interrogatories and SCPL Response to Interrogatories.

⁵¹ Application, Appendix 1, page 16.

⁵² Application, Exhibit C, Tab 1, Schedule 3, page 1.

54. The EPP is a dynamic document that will be progressively developed as the Project moves through the design, permitting and construction phases.⁵³ SCPL will consult with Indigenous Communities in the creation of the EPP.⁵⁴
55. The EPP will include several Project specific management plans that will be topic specific to provide clear and transparent guidance regarding permit approval terms and conditions, other regulatory requirements, and commitments made as part of the ER.⁵⁵
56. SCPL submits that with the implementation of the recommendations in the ER, on-going communication and consultation, and adherence to permit, regulatory and legislative requirements, potential adverse residual environmental and socio-economic impacts of the project are not anticipated to be significant relative to the benefits of the project.⁵⁶ SCPL submits that it has satisfactorily mitigated all potential environmental impacts of the Project.

E. Impacts on Owners

a. Has the applicant demonstrated that any proposed forms of landowner agreements under section 97 of the OEB Act are appropriate?

57. On January 17, 2022, SCPL filed a form of permanent easement agreement with the Application in Exhibit E.
58. On March 31, 2022, the OEB issued the Handbook, which included filing requirements for land use agreements at Appendix C.
59. On April 25, 2022, SCPL filed an updated the form of permanent easement agreement titled “Grant of Easement Pipeline (Ontario) Agreement” it will offer or has offered to affected owners as part of the interrogatory response at Staff-7-2 (see Appendix Staff-7-2) that encompasses the elements outlined in Appendix C of the Handbook.⁵⁷
60. The form of permanent easement agreement proposed by SCPL is substantially similar to the sample forms of agreement identified in footnote 46 of the Handbook. SCPL views the permanent easement agreement as (a) more protective of transferees than what is cited the Handbook; and (b) more transparent and likely more intelligible to a non-lawyer than what is cited the Handbook.⁵⁸
61. SCPL submits that the Project proactively responds to all land matters. SCPL will obtain all land-related permits and agreements required with or for Project construction. As outlined in the Application, SCPL has engaged in extensive public consultation, including:

⁵³ Ibid.

⁵⁴ SCPL IR Responses, 4-HDI-3.

⁵⁵ Application, Exhibit C, Tab 1, Schedule 3, page 1.

⁵⁶ Application, Appendix 1, Executive Summary; SCPL IR Responses, Staff-9(5).

⁵⁷ SCPL IR Responses, Staff-7(4).

⁵⁸ SCPL IR Responses, Staff-7(3).

- a. emailing Notice of Commencement letters to all parties identified on the OPCC, Agency and Municipal Contact List on August 20 and 21, 2020 to provide information on the Project, the Preferred Route, and to request any available additional information;
 - b. hand delivering and mailing Project update letters within approximately 500 m of the Preferred Route on September 24, 2020 and December 9, 2020;
 - c. emailing and mailing letters indicating the release of the Environmental Report for review on February 5, 2021;⁵⁹ and
 - d. committing to sharing Project updates as they become available.⁶⁰
62. Permanent easements are required from two privately owned parcels. Owners of these parcels have existing easements in place with SCPL for the existing pipeline.⁶¹ Both owners have indicated their support for the Project.⁶²
63. Access and temporary workspace is required on two privately owned commercial parcels and one municipally owned parcel. Easements are currently in place with SCPL on all three parcels for the existing pipeline. SCPL will secure temporary workspaces via existing easement agreements with neighbouring parties. No new owners will be affected.⁶³
64. Two access roads are required to facilitate construction of the Project. An access road from Trafalgar Road will utilize the existing PAO Horticultural nursery internal site roads. This access will only be accessible to pick-up trucks and small personal vehicles. A second access road is required from 6th Line via an existing agricultural lane. Access to the temporary drill pad east of Trafalgar Road will be directly from Trafalgar Road. Temporary workspace agreements for these access roads will be negotiated with these owners.⁶⁴
65. Impacted owners/tenants will be compensated for access and disturbance as per SCPL's standard compensation procedure. Compensation is provided at predetermined rates for temporary workspace required on or off of the pipeline easement. Applicable rates are determined using a percentage of current property values and crop values. Consideration is given for disturbance and property restoration.⁶⁵

⁵⁹ Application, Appendix 3.

⁶⁰ Application, Exhibit G, Tab 1, Schedule 1, page 1.

⁶¹ Application, Exhibit E, Tab 1, Schedule 1, page 1.

⁶² SCPL Response to Interrogatories, Appendix Staff-7-1.

⁶³ Application, Exhibit E, Tab 1, Schedule 1, page 1.

⁶⁴ Application, Exhibit E, Tab 1, Schedule 1, page 3.

⁶⁵ Application, Exhibit E, Tab 1, Schedule 2, page 1.

66. SCPL has been in ongoing direct discussion and negotiation with all owners directly impacted by new easements. Both owners have agreed in principle to the new easements and SCPL is continuing negotiations on the final financial terms of those agreements.⁶⁶

67. As outlined above, SCPL has minimized the impact to, and the number of affected, owners by utilizing as much of the existing pipeline ROW as possible, and has carefully considered and ruled out other pipeline routes. Pursuant to section 97 of the Act, SCPL has offered or will offer to each owner of land affected by the approved route or location an agreement in the form submitted for approval by the OEB, which SCPL submits is substantially similar to those previously approved by the OEB.

b. Does the route map provided pursuant to section 94 of the OEB Act show the general location of the proposed work and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed work is to pass?

68. SCPL submits that the route maps provided in Appendix A and Appendix C of the ER satisfy this requirement.

F. Indigenous Consultation

a. To the extent that the project triggers the Constitutional duty to consult, has the proponent followed the Indigenous consultation requirements from the Environmental Guidelines? Has the duty to consult and, to the extent required, accommodate, been met sufficiently to allow the OEB to approve the application?

69. Indigenous consultation, guided by the requirements of the Environmental Guidelines, has been an integral part of SCPL's planning of the Project. SCPL is not aware of any outstanding project-specific impacts on the rights and interests of any affected Indigenous Communities.

70. SCPL has and will continue to work diligently to understand Indigenous perspectives on issues associated with the Project and to engage with Indigenous Communities and their representatives in open and forthright consultation.

71. The OEB is assessing the consultation associated with the Project at hand. Assessing claims for past infringement such as the construction of the original pipeline is beyond the scope of the OEB's review under sections 90, 96 and 97 of the Act.

72. SCPL submits that it followed the Indigenous consultation requirements from the Environmental Guidelines and the duty to consult has been sufficiently satisfied to allow the OEB to approve the Application.

⁶⁶ Ibid.

(a) *SCPL was Delegated the Procedural Aspects of Consultation*

73. Indigenous Communities were identified through the provision of a Project Summary to the MENDM on June 6, 2020.
74. On July 28, 2020, the MENDM issued a letter to SCPL, pursuant to which certain procedural aspects of the Crown's duty to consult were delegated to SCPL (the "**Delegation Letter**"). The potentially impacted Indigenous Communities identified in the Delegation Letter were: the Mississaugas of the Credit First Nation (the "**MCFN**"); the Six Nations of the Grand River—including both the Six Nations Elected Council (the "**SNEC**") and Haudenosaunee Confederacy Chiefs Council (the "**HCCC**"); and the Huron Wendat Nation (the "**HWN**") (collectively, the "**Indigenous Communities**"). The MCFN, SNEC and HCCC were listed on the basis of rights, and HWN was listed on the basis of its interest in archeological resources.
75. SCPL also notified the Métis Nations of Ontario pursuant to the Letter of Direction from the OEB and received confirmation of the same on February 18, 2022.⁶⁷ However, no response has been received to date from the Métis Nations of Ontario.

(b) *The Duty to Consult is Satisfied through the OEB's Process*

76. The Supreme Court of Canada has confirmed in two decisions, *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*⁶⁸ and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*⁶⁹ that the National Energy Board ("**NEB**"), as it then was, has the procedural powers to implement consultation and the remedial powers to impose and enforce accommodation measures as well as the requisite technical expertise. The Court also acknowledged the Crown's ability to rely on the Board's regulatory assessment process to fulfill its duty to consult.
77. Similar to the NEB, the Act provides the OEB with broad powers and expansive remedial authority to deal with the impacts of provincially-regulated pipeline projects. The OEB is the body that is most directly involved in the assessment of leave to construct applications for pipelines in Ontario. Accordingly, the OEB has the technical expertise and the regulatory experience to understand a project, the likelihood of effects, and the measures that can be implemented to minimize effects. In addition, the OEB has the authority to elicit commitments from SCPL, impose conditions on approval of SCPL's leave to construct application, and can ensure ongoing oversight of the Project. Both the NEB and OEB make decisions in the "public interest".⁷⁰
78. Citing *Clyde River* and *Chippewas*, the OEB confirmed this in Procedural Order 4:

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

⁶⁷ OEB Letter of Direction (February 10, 2022)

⁶⁸ 2017 SCC 40.

⁶⁹ 2017 SCC 41.

⁷⁰ The OEB's decision in EB-2017-0182, EB-2017-0194 and EB-2017-0364 can be distinguished on the basis that section 96(2) of the Act does not apply here.

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.

79. The framework within the OEB operates and makes decisions under the Act can provide a practical, effective and efficient way within which the Indigenous Communities can request and receive meaningful assurances from a proponent or the OEB about project-related effects on the rights and interests of Indigenous Communities. Additionally, the OEB's project assessment process must be conducted in a procedurally fair manner and provides funding for an intervenor's eligible costs, such as those for HDI.
80. As stated by the Court in *Haida*, the Indigenous Communities have a reciprocal duty to express their interests and concerns and consult in good faith:⁷¹

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. **As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached** [...] [Emphasis added]

81. SCPL notified HDI and HCCC of the Project approximately two years ago. SCPL has since reached out to HDI and HCCC on numerous occasions to gather input on Project-specific impacts to Aboriginal or treaty rights and any proposed accommodations. SCPL took steps to inform itself on HCCC protocols and processes for project engagement but did not receive timely replies or any indication of interest from HCCC or HDI representatives.⁷² HDI has also been aware of the current construction schedule since February 2021. However, HDI only informed SCPL that it was not fully engaging on March 7, 2022, over a year and a half later, and instead tabled an Engagement Agreement.⁷³
82. The Indigenous Communities do not have a veto over the proposed course of action⁷⁴ and there is no duty to agree.⁷⁵ The goal is a meaningful *process* of consultation. The Indigenous

⁷¹ 2004 SCC 73 at para 42.

⁷² SCPL IR Responses, Staff-9(1).

⁷³ HDI IR responses (June 1, 2022), 2-SCPL-1(c) [HDI IR Responses].

⁷⁴ In *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53, [2010] 3 S.C.R. 103 at para 14; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para 65.

⁷⁵ *Haida Nation* at paras 42 and 49.

Communities must be flexible and reasonable when discussing accommodation options.⁷⁶ However, HDI states that it will oppose the Project unless an Engagement Agreement is concluded notwithstanding being eligible for costs in this proceeding.⁷⁷

83. The Indigenous Communities have had the opportunity to request and receive meaningful assurances from both SCPL and the OEB regarding project related effects on the rights and interests of the Indigenous Communities through the OEB's project assessment process (one-on-one consultation between SCPL and impacted Indigenous Communities, the OEB's hearing process, the OEB's final decision and order, etc.) which is required to be conducted in a procedurally fair manner.
84. Accordingly, 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 Crown may rely on the regulatory processes of the OEB to fulfill the duty to consult.

(c) The Duty to Consult is Proportional to the Indigenous Rights at stake

85. The Supreme Court of Canada has described consultation and accommodation duties as lying on a spectrum.⁷⁸ The extent or content of the duty of consultation is fact specific. The scope of the duty will vary according to the depth of the Indigenous claims and the potential severity of the impact on them.⁷⁹ Where the claim is weak, or the potential infringement is minor, the duty may only be "to give notice, disclose information, and discuss any issues raised in response to the notice".⁸⁰
86. In Procedural Order No. 3 the OEB expected HDI to address the following in its evidence: (a) identifying how Sun-Canadian failed to engage with HDI; (b) identifying how Sun-Canadian failed to address the specific concerns raised by HDI; and (c) provide evidence and explanations for Project-specific impacts to Aboriginal or treaty rights.
87. Despite this, HDI chose in its evidence to not provide evidence and explanations for the Project-specific impacts on Aboriginal or treaty rights. HDI confirms in its interrogatory responses that it has not conducted an assessment of the impacts of the Project despite the OEB's clear expectations.⁸¹

⁷⁶ *Haida Nation* at paras 47-50, 62-63; *Mikisew Cree* at para 66; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, McLachlin C.J. at para 2; *Native Council of Nova Scotia* at para 60; *Kwicksutaineuk* at para 124.

⁷⁷ HDI IR Responses, Staff-1(5) and HDI Evidence, Tab 1, at para 44.

⁷⁸ *Haida Nation* at para 43.

⁷⁹ *Haida Nation* at para 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para 36.

⁸⁰ *Haida Nation* at para 43.

⁸¹ HDI IR responses, Staff-2.

88. Rather, in its evidence HDI says that it was unable to do so because SCPL refused to sign an Engagement Agreement. SCPL does not agree. As SCPL pointed out in 4-SCPL-1, HDI is eligible for cost awards in this EB-2022-0012. It serves to follow that since the OEB accepted HDI's proposal to provide intervenor evidence and the OEB provided clear expectations on what the OEB expects HDI to address in its evidence in Procedural Order No. 3 which included evidence and explanations for Project-specific impacts to Aboriginal or treaty rights – that HDI's reasonable costs incurred to provide this evidence would be recoverable under OEB's cost award process.
89. In this context, HDI simply chose not to provide evidence on Project impacts.
90. The uncontroverted evidence on the record of proceeding is that no significant adverse residual impacts on Indigenous interests are anticipated.⁸² If constitutionally protected Aboriginal or treaty rights will be adversely affected by the project, it is expected that these impacts will be temporary and transitory during the construction phase.⁸³ Sun-Canadian has responded to all of Indigenous Communities' Project-specific concerns, including HDI and HCCC.⁸⁴
91. As a result, the level of consultation and accommodation required for the Project is at the low end of the spectrum. SCPL has not only met, but exceeded, its proportional duty to consult obligations, having undertaken extensive consultation activities, including:
- (a) notifying Indigenous Communities early and often throughout the regulatory process;
 - (b) providing Indigenous Communities with Project information, including Project descriptions, timelines, and maps;
 - (c) explaining regulatory and approval processes that apply to the Project to Indigenous Communities;
 - (d) involving Indigenous Communities in archeological assessment planning;
 - (e) enabling the participation of Indigenous field monitors in archaeological and environmental field studies and providing capacity funding to facilitate participation;
 - (f) sharing archaeological assessment findings and draft reports for review and comment;
 - (g) providing Indigenous Communities with the Environmental Report and Environmental Protection Plan for review and comment; and
 - (h) explaining that it will work to ensure that feedback, comments, and concerns can be raised by Indigenous Communities at any time for consideration throughout the life of the Project as SCPL is committed to on-going engagement.

⁸² Application, Appendix 1, section 4.4.10.

⁸³ SCPL IR Responses, Staff-9(5).

⁸⁴ SCPL IR Responses, Staff-9(2).

92. In this context, SCPL submits that the execution of the Engagement Agreement proposed by HDI is not a condition to satisfying the duty to consult.
93. The Engagement Agreement has been filed on the confidential record in this proceeding. As was more fully explored in 3-SCPL-1, it is SCPL's view that the Engagement Agreement goes well beyond the scope of the project and beyond the scope of SCPL's obligations as it relates to fulfilling the procedural aspects of the duty to consult for this particular project. SCPL's concern is that the Engagement Agreement gives HDI a preferential (as compared to other affected Indigenous Communities) and effective veto over the project that goes well beyond what is required for this particular project.
94. SCPL submits that in general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right.⁸⁵
95. In this case, SCPL submits that the facts are that for this Project the potential for infringement on any asserted rights are non-existent or minor. In such cases, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to notice.⁸⁶
96. It is SCPL's submission that the duty to consult does not provide Indigenous groups with a "veto" over the project.⁸⁷ Rather, proper accommodation stresses the need to balance competing societal interests with Aboriginal and treaty rights.
97. Finally, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,⁸⁸ the court emphasised the importance of focusing on novel or incremental impacts from the current project / decision under consideration. HDI has failed to identify any novel or incremental impacts arising from the Project in this case.
98. In addition, while HDI is an organization set up and answerable to the Haudenosaunee people, it does not appear to have any corporate status (under Ontario law) and the proposed Engagement Agreement does not include the Haudenosaunee Confederacy Chiefs Council ("HCCC") as a party to the agreement.⁸⁹ Delegation of authority from HCCC to HDI was made without evidence of a confirmatory resolution, despite a reasonable request to provide a copy. SCPL requested evidence of such delegation, but HDI stated that the delegation is recorded in the minutes of HCCC council, which are held at Ohsweken, and only available in person by request.⁹⁰ For this reason, any agreement without the HCCC providing legal authority to enter into would be subject to

⁸⁵ *Tsilhqot'in Nation v. British Columbia*, [2014 SCC 44 at para. 79](#); *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, [2014 FCA 189 at para. 91](#).

⁸⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73 at para. 35](#) [*Haida*].

⁸⁷ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017 SCC 41](#) [*Chippewas*].

⁸⁸ [2010 SCC 43](#) [*Rio Tinto*].

⁸⁹ *R. v. Green*, 2017 ONCJ 705 at para 72.

⁹⁰ HDI IR Responses, 1-SCPL-1(5).

future challenge for validity and authority to bind. SCPL cannot be expected to enter into an agreement with such legal uncertainty. Nor can it accept terms that have no basis in law or practice.

G. Conditions of Approval

- a. The OEB's standard conditions of approval are attached as Schedule 1. If the OEB approves the proposed project, what additional or revised conditions, if any, are appropriate?**

99. SCPL submits that this issue is addressed in interrogatory response Staff-10. SCPL requested the following revision to the OEB's standard conditions of approval:⁹¹

Sun-Canadian requests that section 2(b)(i) be amended from "10 days" to "3 days". Given the urgent circumstances and potential environmental risks, Sun-Canadian intends to begin construction shortly after leave-to-construct is granted. Please see the reasons provided in Staff-1-1.

H. Other Issues

- a. Objection to the Evidence of Mr. Aidan Hollis**

100. SCPL understands that HDI is asking that the OEB qualify Mr. Hollis as an expert in the area of economics, industrial organization, and damages quantification.⁹²

101. Mr. Hollis states that his research focuses on the operation and effects of intangible rights, typically in the patent space and concerning the patent system and its effect on innovation.⁹³ The list of cases where Mr. Hollis was qualified as an expert witness reflects his focus in the patent space.⁹⁴

102. SCPL submits that Mr. Hollis does not qualify in any area of expertise that is relevant to the matters before the OEB in this Application. Nearly all of Mr. Hollis' evidence is outside his stated areas of expertise, contains unsupported statements without references to independently published resources and focuses on the interpretation of law and treaties. For example, Mr. Hollis makes the following bald statements in his affidavit:

- a. "We can draw certain definite conclusions from the *Nanfan*."
- b. "The Chiefs understood that they were making an agreement in which they would continue to have access to hunting on those lands."
- c. "Three Possible Interpretations of the Rights under Nanfan"
- d. "First, I note that in *R v Ireland*, the court has indicated that "Treaties with Indians should be given a liberal interpretation in favour of the Indians. The honour of the Crown is at stake. Treaty provisions are to be construed in the sense in which they would have

⁹¹ SCPL IR Responses, Staff-10.

⁹² HDI IR Responses, 8-SCPL-1 (a.)

⁹³ HDI Evidence, Tab 3, page 2.

⁹⁴ HDI IR Responses, 8-SCPL-1(c).

naturally been understood by the Indians.” This seems generally to suggest to me that the preferred interpretation of the treaty is more likely to be the broadest one.”

103. In the alternative, SCPL requests that the OEB give Mr. Hollis’ evidence little weight in light of the foregoing. Even if the OEB qualifies Mr. Hollis as an expert witness, which SCPL disputes, HDI notes that Mr. Hollis has not conducted an assessment of the impacts of the Project. It is not clear to SCPL how any “damages quantification or assessing economic implications” are possible without understanding potential Project-specific impacts. For this reason SCPL argues that Mr. Hollis’ evidence has no relevance to the Application.

III. CONCLUSION

104. This Project addresses an urgent need to eliminate an identified pipeline integrity concern to ensure continued safe, reliable and environmentally responsible operation of the pipeline.
105. The pipeline is crucial infrastructure that supplies refined fuel products from refineries in the Sarnia area to London, Hamilton and Toronto areas including Pearson Airport. Disruption of that supply, such as an extended outage resulting from a loss of containment from an exposed pipeline, could result in negative economic impacts to consumers in these regions.⁹⁵
106. The Project meets all the relevant requirements and the consultation activities exceed the requirements of the Environmental Guidelines.
107. Accordingly, SCPL submits that the OEB should determine that the Project is in the public interest and issue leave to construct.

⁹⁵ SCPL IR Responses, Staff-1(3).