



Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

June 15, 2022

Ms. Nancy Marconi  
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Ontario Energy Board  
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Dear Ms. Marconi:

**Re: Ontario Energy Board Staff Submission  
Sun-Canadian Pipe Line Company Limited (Sun-Canadian)  
NPS 12 East Sixteen Mile Creek Pipeline Replacement Project  
OEB File Number: EB-2022-0012**

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Please find attached the OEB staff submission in the above referenced proceeding, pursuant to Procedural Order No. 4.

Yours truly,

Judith Fernandes  
Senior Advisor, Natural Gas Applications

Encl.

c: All parties in EB-2022-0012



# **ONTARIO ENERGY BOARD**

## **OEB Staff Submission**

**Sun-Canadian Pipe Line Company Limited**

**NPS 12 East Sixteen Mile Creek  
Pipeline Replacement Project**

**EB-2022-0012**

**June 15, 2022**

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## Application Summary and Process

On January 17, 2022, Sun-Canadian Pipe Line Company Limited (Sun-Canadian) filed an application seeking orders from the OEB:

- (a) Under section 90(1) of the Ontario Energy Board Act, 1998 (Act), for leave to construct approximately 480 metres of pipeline to replace a segment of an existing 12-inch pipeline in the vicinity of the East Sixteen Mile Creek crossing, in the Town of Milton, Ontario (the Project).
- (b) Under section 97 of the Act, for approval of the form of agreement it offers to landowners to use their land for routing or construction of the proposed pipeline (the Application).

Sun-Canadian hopes to commence construction of the Project in July 2022 with construction of the replacement pipeline segment anticipated to take between 30 and 45 days.

The OEB issued a Notice of Hearing on February 10, 2022. The Haudenosaunee Development Institute (HDI), which has delegated authority from the Haudenosaunee Confederacy Chiefs Council (HCCC) applied for intervenor status and cost eligibility. HDI's request for intervenor status included a request to file evidence and a request for an oral hearing.

On March 22, 2022, the OEB issued Procedural Order No. 1 approving HDI as an intervenor and confirming its cost eligibility. Procedural Order No. 1 required HDI to file a letter with the OEB providing more information on the evidence to be filed by HDI (Evidence Letter). With respect to HDI's request for an oral hearing, the OEB stated that it will make its determination on the type of hearing after its review of the interrogatory responses and intervenor evidence, as applicable.

Through the course of the proceeding, the OEB issued five procedural orders that have addressed a number of matters including the following:

- the filing of evidence by HDI
- multiple requests from HDI for extensions of time for the filing of the Evidence Letter, interrogatories on the evidence of Sun-Canadian, and its evidence
- request from Sun-Canadian for an extension of time for the filing of its interrogatory responses in response to the extensions of time requested by HDI
- concerns raised by HDI with respect to the OEB's approach to the duty to consult

and the timeline provided for the filing of its evidence

- HDI's request for an oral hearing of the Application
- confidentiality request from Sun-Canadian for HDI's form of Engagement Agreement which was provided with its interrogatories to HDI and its interrogatories pertaining to the Engagement Agreement

The OEB determined that an oral hearing was not necessary in the context of this application. The OEB's written hearing process provided for the filing of evidence by Sun-Canadian and HDI, discovery on the evidence filed by Sun-Canadian and HDI through interrogatories, the filing of an argument-in-chief by Sun-Canadian, submissions by OEB staff and HDI, and a reply submission by Sun-Canadian.

OEB staff supports the approval of Sun-Canadian's leave to construct Application, subject to the conditions of approval contained in Appendix A of this submission. OEB staff also supports the approval of the form of easement agreement proposed by Sun-Canadian.

## **OEB Staff Submission**

The OEB has a standard issues list for section 90 leave to construct applications. OEB staff's submission addresses each of these issues.

## **Project Need**

The existing pipeline is used for transporting hydrocarbon refined product from Sarnia to London, Hamilton, and Toronto.

Sun-Canadian stated that its 2019 annual water survey identified three locations along the existing pipeline with low or no cover due to natural erosion caused by the water flowing through the creek. At that time, Sun-Canadian implemented mitigation measures to temporarily protect the pipeline infrastructure. Sun-Canadian stated that the Project is needed to maintain compliance with section 4.11 of the Canadian Standards Authority (CSA) CSA Z662-19 which recognizes that water crossings can be subject to erosion and which requires water crossings to be buried to a depth of at least 1.2 meters.<sup>1</sup>

Sun-Canadian stated that to support the continued safe and reliable transportation of product and operation of the pipeline, it plans to replace approximately 480 metres of

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<sup>1</sup> Sun-Canadian IRR – OEB Staff -1, p.2

the existing pipeline in the vicinity of the East Sixteen Mile Creek with a new section of pipeline, which will be installed at a depth that will eliminate the identified areas of shallow depth of cover.

Sun-Canadian plans to construct the new section using horizontal directional drilling (HDD) to install it deeper below the creek. Once the replacement segment is installed, the existing section will be decommissioned by isolating it, removing any remaining product from it, capping it, and filling it with concrete, following all relevant safety and technical standards.

### ***Project Alternatives***

Sun-Canadian provided the following comparison of the alternatives it considered<sup>2</sup>:

Metric	Do Nothing	Maintain temp. mitigations	Line lowering	In-water remediation	Line replacement by HDD
Installation Cost	Very low	Low	Medium	High	Very high
Technical Feasibility	Very low	Medium	Very low	High	High
Timing	None	July 1st to Sept. 15th	July 1st to Sept. 15th	July 1st to Sept. 15th	July 1st to Sept. 15th
Reliability	Very poor	Poor	Good	Good	Very good
Safety	Very poor	Poor	Good	Good	Very good
Land Use	No change	No change	No change	No change	Additional easement
Permitting	None required	Not permitted	Multiple permits	Multiple permits	Multiple permits
Municipal Impact	None	None	None	None	Low
Landowner Impact	None	Low	Very high	Very high	Medium
Environmental Impact	Very high	Medium	Very high	Very high	Low

Sun-Canadian stated that undertaking line replacement through HDD is the highest-cost option but provides the most effective long-term protection of the water crossing and requires the least amount of construction impact on the local environment, the creek, and impacted landowners.

<sup>2</sup> Sun-Canadian IRR – OEB Staff -2, p.5

### ***Project Timing***

Sun-Canadian stated that the Project is urgently needed owing to the consequences if hydrocarbons are released into the creek and the increased probability of loss of containment due to having exposed pipe in the creek.

Construction of the Project is constrained by the permitted construction window of July 1 to September 15 for the HDD activities. This construction window was established to protect sensitive life stages for Silver Shiner, and fish in general, based on communications with Ministry of Environment, Conservation and Parks. Sun-Canadian stated that if the Project cannot be completed within this construction window, the work will be delayed until July 2023.<sup>3</sup>

Sun-Canadian noted that postponement of construction to July 2023 will require it to repair and/or upgrade the existing mitigation measures that were installed in 2019. This will require Sun-Canadian to obtain emergency permits from both federal and provincial agencies to allow for heavy equipment access, to dam and dewater the work area, and to repair the bank armouring and pipe support structures. Sun-Canadian stated that this work poses additional risks to worker safety and the environment as the repair work will be done in or around open, fast-moving water and steep slopes within an environmentally sensitive area. Further, the repair work would require in-water activities, potentially resulting in impacts to aquatic and terrestrial environments in the creek valley.

Based on the pre-filed evidence and responses to interrogatories provided by Sun-Canadian, OEB staff submits that there is a need for the Project. OEB staff supports Sun-Canadian's proposal as the best option to meet the stated need. OEB staff submits that the Project is the most effective option in terms of long-term reliability and safety and minimizes impact on landowners and the environment as compared to the other alternatives considered by Sun-Canadian. As discussed below, project costs are not relevant to the OEB's review of the Project.

### **Project Cost and Economics**

Sun-Canadian is a non-rate regulated private enterprise that will wholly finance the Project. As a result, the Project will not have a cost impact on ratepayers.

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<sup>3</sup> Sun-Canadian IRR – OEB Staff -1, p.2

Sun-Canadian stated that disclosure of project costs and an economic feasibility assessment are not applicable. Sun-Canadian noted that this approach is supported by the OEB's Decision on a leave to construct application filed by Imperial Oil Limited, which stated:

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.<sup>4</sup>

OEB staff agrees with the rationale presented by Sun-Canadian regarding non-disclosure of the Project costs. OEB staff submits that the OEB does not need to consider the Project costs as part of its review in the current proceeding as Sun-Canadian is fully funding the Project (and there are no financial impacts for ratepayers).

## Land Matters

Sun-Canadian stated that it has been in ongoing direct discussion and negotiation with all landowners directly impacted by the Project.

The Project will require the use of the existing easement, and new permanent and temporary easements. Sun-Canadian stated that the existing easement will be used for approximately 300m of the new alignment, including the crossing of Trafalgar Road. Two new permanent easements will be required for the replacement pipeline segment. The new easements affect two privately owned properties. The owners of these properties have the existing pipeline on their properties. No new landowners will be affected. In response to interrogatories, Sun-Canadian provided evidence demonstrating that both landowners have agreed in principle to the new easements and Sun-Canadian is continuing negotiations on the final financial terms of those agreements.<sup>5</sup>

Sun-Canadian noted that three access and temporary workspace easements will be required for construction of the Project.

Sun-Canadian filed a form of permanent easement for the OEB's approval. In its response to interrogatories, Sun-Canadian stated that its proposed form of permanent easement agreement is substantially similar to the sample forms of agreement

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<sup>4</sup> EB-2019-0007 Decision and Order, p.5

<sup>5</sup> Sun-Canadian IRR, OEB Staff-7, Appendix -7-1



referenced in the OEB's *Natural Gas Facilities Handbook* (Handbook).<sup>6</sup> Sun-Canadian provided a comparison of the various clauses in its proposed agreement to the examples in the Handbook. Sun-Canadian stated that it views its proposed agreement as more protective of Transferees, more transparent and likely more comprehensible.

With respect to the temporary easements, Sun-Canadian stated that its proposed permanent easement agreement includes provisions that are sufficient to govern temporary access to the easement lands and it does not require a separate temporary access agreement. Access and temporary workspace is required on the two privately owned parcels and one municipally owned parcel. Existing easements are in place with Sun-Canadian on all three parcels for the existing pipeline. Sun-Canadian will secure temporary workspaces via existing easement agreements. No new landowners will be affected.

OEB staff submits that Sun-Canadian is appropriately managing land related matters. OEB staff submits that the OEB should approve Sun-Canadian's proposed form of easement agreement as it is substantially the same as the sample forms of agreement outlined in the Handbook. In OEB staff's view, the proposed form of agreement addresses the new permanent easements and the access and temporary workspace required, given that the same landowners are affected.

## Environmental Matters

Sun-Canadian retained Stantec Consulting Ltd. (Stantec) to complete an environmental assessment for the Project, in accordance with the OEB's Environmental Guidelines.<sup>7</sup>

Stantec prepared an Environmental Report (ER) for the Project identifying the environmental and socio-economic features along the route of the proposed pipeline. Stantec concluded that, with the implementation of its recommendations, on-going communication and consultation, environmental and supplementary studies 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.

According to the ER, a consultation and engagement program was undertaken to permit interested and potentially affected parties to provide input into the Project. These included federal and provincial agencies and authorities, Conservation Halton, members

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<sup>6</sup> Sun-Canadian IRR, OEB Staff-7, p.16

<sup>7</sup> Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines in Ontario (7<sup>th</sup> edition), 2016

of the Ontario Pipeline Coordinating Committee, municipalities, and Indigenous communities. Input received was evaluated and integrated into the Project where appropriate. Sun-Canadian has committed to on-going consultation with directly and indirectly affected landowners and interested parties during detailed design and construction and will continue to respond to concerns through the life of the Project.

Sun-Canadian has committed to developing a project specific Environmental Protection Plan (EPP) that will build on the mitigation measures monitoring and contingency plans identified within the ER, prior to construction.

The Application identified potential environmental/land permits and approvals from federal, provincial and municipal agencies that Sun-Canadian requires to construct the Project. In response to interrogatories, Sun-Canadian provided an update on the status of the permits/approvals it requires for the Project.<sup>8</sup>

OEB staff submits that Sun-Canadian has completed the ER in accordance with the OEB's Environmental Guidelines. OEB staff has no concerns with the environmental aspects of the Project, based on Sun-Canadian's commitment to implement the mitigation measures set out in the ER and to complete the EPP prior to the start of construction. OEB staff submits that Sun-Canadian's compliance with the conditions of approval outlined in Appendix A will ensure that impacts of pipeline construction are mitigated and monitored. OEB staff notes that the proposed conditions of approval also require Sun-Canadian to obtain all necessary approvals, permits, licences, and certificates needed to construct, operate and maintain the Project.

## Indigenous Consultation

### *Background*

In accordance with the OEB's Environmental Guidelines, on June 6, 2020, Sun-Canadian contacted the Ministry of Energy (Ministry) in respect of the Crown's duty to consult related to the Project.

The Ministry issued a letter (Delegation Letter) on July 28, 2020 delegating the procedural aspects of the Crown's duty to consult to Sun-Canadian. The Delegation Letter identified the following Indigenous communities to be consulted:

- Huron-Wendat Nation
- Mississaugas of the Credit First Nation

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<sup>8</sup> Sun-Canadian IRR, OEB Staff-4, p.8

- Six Nations of the Grand River

With respect to the Six Nations of the Grand River, the Delegation Letter noted that consultation is required with both the Six Nations Elected Council and Haudenosaunee Confederacy Chiefs Council (HCCC), and that all correspondence with the HCCC should copy HDI.

Each of these Indigenous communities and the Métis Nation of Ontario were served the Notice of Hearing for the Application, in accordance with the OEB's Letter of Direction. The Notice specified that "[t]he OEB will also assess whether the duty to consult with Indigenous communities potentially affected by the proposed pipeline has been discharged with respect to the application." HDI applied for and was granted both intervenor status and eligibility to apply for an award of costs. None of the Huron-Wendat Nation, the Mississaugas of the Credit First Nation, nor the Métis Nation of Ontario sought to intervene or raised any concerns with respect to the Project.

As required by the Environmental Guidelines, Sun-Canadian provided an Indigenous Consultation Report for the Project with the Application,<sup>9</sup> and also provided an updated consultation summary table as requested by OEB staff through the interrogatory process.

OEB staff has reviewed the argument-in-chief of Sun-Canadian, and subject to the comments below, generally agrees with those submissions. OEB staff has not yet seen the final submission of HDI (which is due at the same time as OEB staff's submission). However, based on the letters filed by HDI, the evidence it has filed, and its responses to interrogatories on that evidence, it is OEB staff's understanding that HDI does not accept that the duty to consult has been properly discharged for the Project.<sup>10</sup>

### ***The duty to consult – general principles***

The duty to consult (sometimes referred to as the duty to consult and accommodate) is a legal doctrine that was initially described by the Supreme Court of Canada in the 2004 decision *Haida Nation v. British Columbia (Minister of Forests)*.<sup>11</sup> The duty to consult arises where (1) the Crown has knowledge of a potential Aboriginal claim or right, (2) the Crown contemplates conduct, (3) there is the potential that the contemplated conduct may adversely impact the Aboriginal claim or right.

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<sup>9</sup> See Exhibit F, including appendices.

<sup>10</sup> See, for example, HDI's response to OEB Staff-1, part 5.

<sup>11</sup> 2004 SCC 73 (Haida)

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As later summarized by the Supreme Court in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*:

The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct. Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible.<sup>12</sup>

The Supreme Court further explained that the duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.<sup>13</sup> The duty to consult is grounded in section 35 of the Canadian Constitution Act, which states: “[t]he existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.”<sup>14</sup> Treaty rights are those expressly provided for in treaties and agreements with the Crown, while Aboriginal rights are common-law rights established through the courts, typically for activities relating to hunting, fishing, harvesting and cultural practices.

The extent of the Crown’s duty to consult will vary depending on the preliminary assessment of the strength of the Aboriginal claim. As noted in *Haida*:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duty arises in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effects upon the right or title claimed.<sup>15</sup>

Where the duty to consult has been triggered, and there are material potential adverse impacts to Aboriginal or treaty rights, there may also be a duty to accommodate:

Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. [...] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good

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<sup>12</sup> 2017 SCC 40 (CanLII) para. 25 (*Clyde River*) (citations omitted)

<sup>13</sup> *Clyde River*, para. 19.

<sup>14</sup> Aboriginal peoples include First Nations peoples, Inuit, and Métis. Although the term “Indigenous” is now more commonly used, both the Constitution and much of the case law use the term Aboriginal.

<sup>15</sup> *Haida*, para. 39.

faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.<sup>16</sup>

Although potential adverse impacts to Aboriginal or treaty rights give rise to a duty to consult, there is no duty to agree, but rather good faith efforts on the part of both the Crown and Indigenous communities to understand each other's concerns and move to address them. The duty to consult does not provide Indigenous communities with a veto over proposed Crown conduct, nor is Indigenous consent required except under rare circumstances.<sup>17</sup>

The courts have also noted that it is the current conduct that should be considered, and not impairments arising from previous conduct:

The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. [...] To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.<sup>18</sup>

### ***The role of tribunals***

The Supreme Court of Canada has confirmed that a tribunal's approval process can trigger the duty to consult, and that in many cases the Crown can rely on a tribunal's approval process to fulfill the duty to consult and, where appropriate, accommodate.

With respect to when a tribunal will have the responsibility to consider the duty to consult, the Court observed:

Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly

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<sup>16</sup> Haida, paras. 46-47.

<sup>17</sup> Haida, paras. 48-49.

<sup>18</sup> *Rio Tinto Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII) (Carrier Sekani), para. 49.

before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power". Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn. It follows that they must ensure their decisions comply with s. 35 of the Constitution Act, 1982.<sup>19</sup>

The Court further clarified that where a tribunal has the powers to consider the duty to consult and the remedial powers to address any deficiencies, no separate Crown actor is required to conduct independent consultation. The SCC held that the Crown can rely on a regulatory agency or tribunal, in whole or in part, as long as the agency or tribunal possesses the statutory powers to do what the duty to consult requires in the particular circumstances.<sup>20</sup> In other words, the regulatory process itself can serve to discharge the duty to consult.

The OEB has the authority to hear questions of law for all matters within its jurisdiction.<sup>21</sup> The OEB also has significant remedial powers to address any impacts the Project could have on Aboriginal or treaty rights. As noted in Procedural Order No. 4, if there are impacts on Aboriginal or treaty rights the OEB will consider whether the Project should be approved, approved with conditions designed to accommodate any impact, or denied, based on the evidentiary record that is before it.

In order to ensure that it has all the information it requires to make a determination on the duty to consult, the OEB has developed a process to ensure that all relevant concerns and evidence can be placed before it through the hearing process. This process is set out in the Environmental Guidelines, and also through the procedural steps established by the OEB in this proceeding. The process includes:

- Early (i.e. pre-application) identification of potentially impacted Indigenous communities by the Ministry of Energy and a delegation of the procedural aspects of the duty to consult to the applicant. In the current case this took place through in a letter from the Ministry to Sun-Canadian dated July 28, 2020.
- The requirement that the applicant engage with potentially impacted Indigenous communities and prepare and file an Indigenous Consultation Report that describes the consultation activities that were undertaken, provides copies of all communications and a summary of any rights-based concerns raised by Indigenous communities, and describes any accommodations that are proposed.

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<sup>19</sup> *Hamlet of Clyde River v. Petroleum Geo-services Inc.*, 2017 SCC 41 (CanLII) (Clyde River) para. 36.

<sup>20</sup> *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* 2017 SCC 41 (CanLII) (Chippewas), para. 32; Clyde River, para. 30.

<sup>21</sup> OEB Act, s. 19.

Sun-Canadian filed all of this information with its Application and updated the information as appropriate in response to interrogatories.

- Once the application is filed, the OEB provides notice to all potentially impacted Indigenous communities, including a statement that “[t]he OEB will also assess whether the duty to consult with Indigenous communities potentially affected by the proposed pipeline has been discharged with respect to the application.” In the current case this notice was served directly on HCCC (and copied to HDI) in February 2022. HDI sought intervenor status and eligibility for an award of costs in response to this notice, both of which were granted by the OEB.
- The OEB allows the application to be thoroughly tested through the interrogatory process, including any questions with respect to the duty to consult as it relates to the project. In the current case HDI filed its interrogatories to the applicant on April 12, 2022, and Sun-Canadian provided its responses on April 25, 2022.
- The OEB permits parties to file evidence that is relevant to the application, including evidence related to the duty to consult. HDI filed extensive evidence related to the duty to consult on May 13, 2022.
- All parties are permitted to file final argument with the OEB, through which they can recommend whatever outcome to the proceeding they feel is appropriate. The deadline for HDI’s final argument is June 15, 2022.

### ***The duty to consult in the current proceeding***

The OEB has accepted, in both this proceeding and many other section 90 applications, that it can have an important role to play with respect to the duty to consult. As the OEB noted in Procedural Order No. 3, “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.”

Based on the record in this proceeding, however, OEB staff submits there is no evidence that the Project will have an adverse impact on any Aboriginal or treaty rights. The evidence filed by HDI (three affidavits, each with numerous exhibits) provides extensive information with respect to the Haudenosaunee’s Aboriginal and treaty rights in the Project area. HDI has not, however, provided any indication that the Project will actually impact any of these Aboriginal or treaty rights. As detailed by Sun-Canadian in its argument in chief, HDI has had numerous opportunities to review the Project and to provide its comments and concerns with respect to the Project, and yet it has not done so.<sup>22</sup>

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<sup>22</sup> See Sun-Canadian argument in chief, paras. 9-13, 81, 89 and 91.

HDI has also been granted eligibility to apply for an award of costs, and has been permitted to file extensive evidence. In Procedural Order No. 4 the OEB specifically invited HDI to provide evidence detailing its Project related concerns, in particular with respect to concerns related to the duty to consult. The evidence filed by HDI did not address any Project related concerns, and indeed in a response to an interrogatory HDI confirmed that “[g]iven SCPL’s refusal to discuss or execute an engagement agreement, HDI has not conducted an assessment of the impacts of the Project and is therefore not in a position to provide the requested details [regarding how the Project will impact the Haudenosaunee’s Aboriginal or treaty rights].”<sup>23</sup>

### ***OEB staff conclusion with respect to Indigenous consultation and the duty to consult***

Given the absence of any evidence regarding Project specific impacts to Aboriginal or treaty rights, OEB staff agrees with Sun-Canadian’s position that the level of consultation and accommodation (if any) required for the Project falls at the low end of the spectrum. As detailed above, the OEB provided a comprehensive process to allow parties to identify any potential concerns with respect to the duty to consult as it relates to the Project, including notice, interrogatories, the opportunity to file evidence, and the opportunity to file final argument.

The OEB has significant powers to address any adverse impacts to Aboriginal or treaty rights as they relate to the Project, up to and including denying approval for the Project outright. Despite being given numerous opportunities to do so, HDI has not identified any impacts to Aboriginal or treaty rights. OEB staff agrees with Sun-Canadian’s submission that it is not reasonable for HDI to decline to engage with Sun-Canadian or comment on the Environmental Report in the absence of HDI’s proposed engagement agreement.<sup>24</sup> OEB staff submits that no impacts to Aboriginal or treaty rights have been identified, and that the duty to consult has been discharged sufficiently to allow the OEB to approve the Application.

### **Conditions of Approval**

As part of interrogatories, OEB staff suggested that the OEB’s standard conditions of approval for leave to construct applications<sup>25</sup> should apply to the Project with the

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<sup>23</sup> Response to OEB Staff- 2, part 1.

<sup>24</sup> See Sun-Canadian’s argument in chief, para. 93; HDI responses to interrogatories OEB Staff-1 (part 1, 4 and 5), OEB Staff-2, Sun-Canadian- 2 (part (c)), Sun-Canadian-3 (confidential) (parts (a)-(f)).

<sup>25</sup> Natural Gas Facilities Handbook, Appendix D



exception of Condition 6 which requires the applicant to file a post-construction financial report, given that the Project is being financed by Sun-Canadian with no support from ratepayers. Sun-Canadian agreed with this suggestion.<sup>26</sup>

Sun-Canadian proposed an amendment to Section 2(b)(i) of the conditions of approval, requesting that notification to the OEB of the commencement of construction be altered from 10 days to three days as it intends to begin construction shortly after leave to construct is granted. OEB staff supports Sun-Canadian's proposed amendment.

OEB staff submits that the OEB should approve the Project subject to the Conditions of Approval attached as Appendix A to this submission.

~All of which is respectfully submitted~

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<sup>26</sup> Sun-Canadian IRR, OEB Staff-10, p.26

## **Appendix A**

**OEB Staff Submission**

**Conditions of Approval**

**Leave to Construct**

**Application under Section 90 of the OEB Act  
Sun-Canadian Pipe Line Company Limited  
EB-2022-0012**

**CONDITIONS OF APPROVAL**

1. Sun-Canadian Inc. (Sun-Canadian) shall construct the facilities and restore the land in accordance with the OEB's Decision and Order in EB-2022-0012 and these Conditions of Approval.
2. (a) Authorization for leave to construct shall terminate 12 months after the decision is issued, unless construction has commenced prior to that date.  
  
(b) Sun-Canadian shall give the OEB notice in writing:
  - i. of the commencement of construction, at least three days prior to the date construction commences
  - ii. of the planned in-service date, at least 10 days prior to the date the facilities go into service
  - iii. of the date on which construction was completed, no later than 10 days following the completion of construction
  - iv. of the in-service date, no later than 10 days after the facilities go into service
3. Sun-Canadian shall obtain all necessary approvals, permits, licences, certificates, agreements and rights required to construct, operate and maintain the Project.
4. Sun-Canadian shall implement all the recommendations of the Environmental Report filed in the proceeding, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee review.
5. Sun-Canadian shall advise the OEB of any proposed change to OEB-approved construction or restoration procedures. Except in an emergency, Sun-Canadian shall not make any such change without prior notice to and written approval of the OEB. In the event of an emergency, the OEB shall be informed immediately after the fact.
6. Both during and after construction, Sun-Canadian shall monitor the impacts of construction, and shall file with the OEB one electronic (searchable PDF) version of each of the following reports:
  - (a) A post construction report, within three months of the in-service date, which shall:
    - i. provide a certification, by a senior executive of the company, of Sun-Canadian's adherence to Condition 1
    - ii. describe any impacts and outstanding concerns identified during construction

- iii. describe the actions taken or planned to be taken to prevent or mitigate any identified impacts of construction
  - iv. include a log of all complaints received by Sun-Canadian, including the date/time the complaint was received, a description of the complaint, any actions taken to address the complaint, the rationale for taking such actions
  - v. provide a certification, by a senior executive of the company, that the company has obtained all other approvals, permits, licenses, and certificates required to construct, operate, and maintain the proposed project
- (b) A final monitoring report, no later than fifteen months after the in-service date, or, where the deadline falls between December 1 and May 31, the following June 1, which shall:
- i. provide a certification, by a senior executive of the company, of Sun-Canadian's adherence to Condition 4
  - ii. describe the condition of any rehabilitated land
  - iii. describe the effectiveness of any actions taken to prevent or mitigate any identified impacts of construction
  - iv. include the results of analyses and monitoring programs and any recommendations arising therefrom
  - v. include a log of all complaints received by Sun-Canadian, including the date/time the complaint was received; a description of the complaint; any actions taken to address the complaint; and the rationale for taking such actions
7. Sun-Canadian shall designate one of its employees as project manager who will be the point of contact for these conditions, and shall provide the employee's name and contact information to the OEB and to all affected landowners, and shall clearly post the project manager's contact information in a prominent place at the construction site.