EB-2022-0012

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.

REPLY SUBMISSIONS OF SUN-CANADIAN PIPE LINE COMPANY LIMITED

June 22, 2022

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I. INTRODUCTION

1. On January 17, 2022, Sun-Canadian Pipeline Limited ("**SCPL**") filed its application with 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. On June 8, 2022, SCPL filed its written argument-in-chief in respect of the Application (the "**AIC**"). Capitalized terms used in this reply but not otherwise defined herein have the meaning ascribed to those terms in the AIC.

3. SCPL is pleased to submit this written reply to the written submissions of OEB Staff and Haudenosaunee Development Institute ("**HDI**") received June 15, 2022.

4. In its written submissions, OEB Staff agrees with SCPL that:

    a. the Project is needed and that SCPL has chosen the best option to meet this need;[3]
    b. since SCPL is not a rate-regulated entity, the costs of the Project are not a relevant consideration as there will be no financial impacts to ratepayers;[4]
    c. SCPL is appropriately managing land related matters and SCPL's proposed form of easement agreement should be approved as it is substantially the same as the form outlined in the Handbook;[5]
    d. SCPL has completed the ER for the Project in accordance with OEB's Environmental Guidelines, and OEB Staff has no concerns with the environmental aspects of the Project in light of the planned mitigation measures;[6]
    e. there is no evidence that the Project will have an adverse impact on any Aboriginal or treaty rights, and accordingly the Project falls at the low end of the consultation and accommodation spectrum;[7] and

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[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] EB-2022-0012, OEB Staff Submissions at page 4.
[4] Ibid. at page 5.
[5] Ibid. at page 6.
[6] Ibid. at page 7.
[7] Ibid. at page 12.

f. the duty to consult has been discharged sufficiently to allow the OEB to approve the Application.[8]

5. SCPL supports OEB Staff's conclusion that the OEB should approve the Project subject to the Conditions of Approval attached as Appendix A.[9]

6. In this context, HDI has raised several arguments in its submissions to support its position that the duty to consult has not been discharged sufficiently to allow the OEB to approve the Project.

7. For the reasons that follow, SCPL does not agree.

II. The proper approach to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") under Ontario law

8. HDI argues that the promulgation of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDRIP Act")[10] on June 21, 2021 requires the OEB to ensure that the Haudenosaunee have given their free, prior and informed consent prior to granting SCPL's Application.

9. SCPL does not agree. A federal statute implementing an international treaty has no mandatory application on the OEB. Ontario has not incorporated UNDRIP into provincial law and consequently UNDRIP is not binding on the OEB.

10. Canada remains a dualist system in respect of treaty and conventional law. International treaties and conventions are not part of Canadian law unless they have been implemented by statute.[11] As stated by the Privy Council in *Canada (Attorney General) v. Ontario (Attorney General)*, jurisdiction to implement international law is split between the Federal and Provincial governments according to the division of powers set out in the Constitution Act, 1867:[12]

> "For the purposes of secs. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which The B.N.A. Act gives effect."

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[8] Ibid. at page 13.
[9] Ibid. at page 14.
[10] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14
[11] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, at para 149; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at para. 69; *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326 (PC), at para 13; *Legislative Jurisdiction Over Hours of Labour, Re*, [1925] 3 D.L.R. 1114, [1925] S.C.R. 505 (SCC).
[12] *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326 (PC), at para 17.

11. While the UNDRIP Act became federal law on June 21, 2021, this legislation only imposes obligations on the federal government.

12. Conversely, the Province of Ontario has not implemented UNDRIP by statute. Rather, a private member's bill, *Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act, 2019*, has been with Standing Committee on General Government since 2019 and has not been enacted into law as of the date of these submissions.[13]

13. As a consequence, UNDRIP is not legally binding on the OEB, which is an administrative tribunal created under the laws of the Province of Ontario.[14]

14. While the OEB is not obligated to consider UNDRIP, it may serve as a useful tool to inform a fuller understanding of reconciliation.[15]

15. Within Canada the principles contained in UNDRIP are already acknowledged in the common law on the duty to consult. The key elements of this common law have already been summarized by SCPL in argument-in-chief and by OEB Staff in its submissions. UNDRIP does not supersede or replace this common law duty. Rather, it informs how proponents and the Crown approach meeting these legal duties going forward.

16. HDI puts significant emphasis in its submission on the words "free, prior and informed consent", which words are found throughout UNDRIP. They argue, in essence, that these words have the effect of superseding the common law principle that the duty to consult does not provide Indigenous groups with a "veto" over projects.

17. SCPL does not agree. And neither does the federal government. After enacting the UNDRIP Act, the federal government provided a detailed explanation of the Act and its impact on the common law duty to consult.[16] In this explanation the federal government also clearly addressed its interpretation of the words "free, prior and informed consent" in UNDRIP:

> "*References to "free, prior and informed consent" (FPIC) are found throughout the Declaration. They emphasize the importance of recognizing and upholding the rights of Indigenous peoples and ensuring that there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities and territories.*
>
> *More specifically, FPIC describes processes that are free from manipulation or coercion, informed by adequate and timely information, and occur sufficiently prior to a decision that Indigenous rights and interests can be incorporated or addressed effectively as part*

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[13] Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act, 2019, online: <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-76>
[14] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s.4
[15] *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342, at para 123.
[16] Department of Justice Canada, What is free, prior and informed consent?, online: <https://www.justice.gc.ca/eng/declaration/about-apropos.pdf>

of the decision making process - all as part of meaningfully aiming to secure the consent of affected Indigenous peoples.

FPIC is about working together in partnership and respect. In many ways, it reflects the ideals behind the relationship with Indigenous peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests. Despite what some have suggested, it is not about having a veto over government decision-making.

It is important to understand FPIC in context: different initiatives will have different impacts on Indigenous peoples' rights. FPIC may require different processes or new creative ways of working together to ensure meaningful and effective participation in decision-making."[17]

III. SCPL's engagement efforts have been more than sufficient to discharge the duty to consult.

18. SCPL's engagement efforts have been undertaken in a spirit of reconciliation, emphasizing the importance of recognizing and upholding the rights of Indigenous peoples and ensuring that there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities and territories.

19. However, reconciliation requires a relationship of mutual trust and understanding between proponent and Indigenous peoples, striving to achieve consensus as all parties work together in good faith on decisions that impact Indigenous rights and interests.

20. For the vast majority of SCPL's engagement efforts, as summarized at paragraphs 7-13 of its AIC, HDI and HCCC were largely unresponsive. Despite this, SCPL continued to attempt to provide updates on the progress of the project, the ER and subsequently this leave-to-construct approval.

21. When HDI submitted its notice of intervention on March 7, 2022, SCPL did not stop its efforts to engage. Rather, SCPL reached out to HDI to better understand its concerns. Following this meeting, and only at the request of SCPL, HDI did send to SCPL a form of "Engagement Agreement" for its consideration. SCPL reviewed the form of Engagement Agreement in good faith, and found it disproportionate to the scope and scale of the proposed Project, and problematic in various other material respects.

22. For the reasons set out in paragraph 93 and 98 of its AIC, SCPL submits that it is not reasonable for HDI to refuse to engage with SCPL by providing input on Project specific impacts to its Aboriginal or treaty rights in the absence of a signed "Engagement Agreement."

23. SCPL further submits that, for the reasons set out in paragraph 88 of its AIC, it is not reasonable for HDI to refuse to engage with the OEB's adjudicative process by refusing to either submit fresh

[17] Ibid. at page 3.

evidence or adduce through interrogatories any evidence of Project specific impacts to Aboriginal or treaty rights.

24. In retort HDI argues that it should not have to provide evidence on Project specific impacts on Aboriginal or treaty rights until its cost recovery is "guaranteed".[18]

25. SCPL does not believe HDI's argument is credible for the following two reasons.

26. First, throughout this process HDI repeatedly asserted its intentions to submit evidence on Project specific impacts. This was clearly signalled in HDI's letter of intervention dated March 7, 2022[19] and again in HDI's letter requesting leave to file evidence dated April 8, 2022.[20] Neither of these correspondence sought a "guarantee" of costs. In-fact, the first time a concern around a cost "guarantee" arose was in response to 4-SCPL-1, after SCPL pointed out that HDI was eligible to recover its costs in this process. Further, the lack of "guaranteed" cost recovery did not deter HDI from engaging external legal counsel or when preparing 563 pages of evidence that includes affidavits from two different consultants.

27. Any suggestion that SCPL refused to provide capacity funding is without merit. For example:

    a. On December 8, 2020, the Huron Wendat First Nation requested capacity funding to review the archeology report prepared by Timmins Martelle Heritage Consultants Inc. This request was approved by SCPL the next day;[21]
    b. On October 4, 2021, HDI sent a letter requesting that a representee from HDI Environmental Division <u>or</u> Archaeology Division be involved in the Project. SCPL executed <u>both</u> an Archeological Monitoring Agreement and Environmental Monitoring Agreement with HDI. Similar agreements have been in place since at least 2017;[22] and
    c. On February 18, 2022, the Huron Wendat First Nation requested to have a monitor on site for construction monitoring and included an estimate of costs. SCPL accepted this proposal.[23]

28. The simple truth is HDI did not request capacity funding from SCPL to review and assess the Project (note that SCPL does not consider the "Engagement Agreement" with no numbers included equivalent to a request for capacity funding). And when HDI requested cost eligibility in this proceeding, SCPL did not object.

29. Second, the OEB's *Practice Direction on Cost Awards* provides a well understood and clearly defined process for participants in OEB processes to recover costs of up to $330 / hour for certain

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[18] EB-2022-0012, HDI Submission at para 99.
[19] EB-2022-0012, Intervenor Request Letter, March 7, 2022: "The HDI intends to submit evidence and argument in order to better inform the OEB of the potential implications of the EB-2022-0012 at the Proposed Site."
[20] EB-2022-0012, Intervenor Evidence Letter, April 8, 2022
[21] EB-2022-0012, Appendix Staff-9-1, at C-10 to C-13.
[22] EB-2022-0012, Appendix Staff-9-1, at A-30 to A-41; EB-2022-0012, SCPL IR Responses, at 6-SCPL-1.
[23] EB-2022-0012, Appendix Staff-9-1, at C-2 to C-5.

consultants and legal counsel incurred in participating in those processes. While it is true the Practice Direction does not "guarantee" cost recovery, Section 5.01 of the Practice Direction sets out the factors the Board may consider when determining the amount of costs to be awarded. In effect, Section 5.01 reserves the right of the Board to deny costs in order to prevent certain types of conduct which the Board has determined is not conducive to its public interest mandate. It is simply not clear how preparing evidence on Project specific impacts on Aboriginal or treaty rights would trigger any credible concerns about being denied costs under Section 5.01 of the Practice Direction.

30. In this context, the arguments made by HDI at paragraphs 105-108 of its submissions should be rejected. The Federal Court of Appeal has clearly stated that tactical behaviour aimed at ensuring that discussions fail within the time available for consultation is not consistent with reconciliation and would, if tolerated, allow for the effective use of a veto right.[24]

31. SCPL submits that it is not reasonable for HDI to frustrate the OEB's adjudicative process by, on the one hand, choosing not to provide any evidence of potential adverse impacts of the Project, and then on the other hand, arguing that the OEB cannot make a determination on the potential impacts of the Project on the basis of the evidence that is before it. HDI was given the opportunity to challenge SCPL's evidence on Project specific impacts through the interrogatory process and it chose not to do so. HDI was also given the opportunity to file its own evidence on Project specific impacts, and again it chose not to do so.

32. In this context, the OEB is entitled to rely on the evidence it does have before it to assess whether the duty to consult has been met. This includes SCPL's unchallenged evidence on Project specific impacts being non-existent or minor.[25]

IV. The Crown can discharge its duty to consult through the OEB process

33. Much of HDI's argument then attempts to shift focus away from SCPL's extensive engagement efforts towards what the Crown has done to engage with the Haudenosaunee in respect of the Project.[26]

34. SCPL submits that the OEB's existing statutory adjudicative process can be relied on by the Crown to fulfil, in whole or in part, the Crown's duty to consult.

35. In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, and the companion case of *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, the Supreme Court of Canada confirmed that

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[24] *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, at para 55.
[25] EB-2022-0012, SCPL IR Responses at Staff-9(5).
[26] EB-2022-0012, HDI Submission, at paras 33-36 and 73.

the Crown may discharge its duty to consult and accommodate through an existing, statutory tribunal process.[27]

36. When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, this is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated.[28]

37. The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying.[29] The procedural orders in this proceeding set out the OEB's intentions in this regard.

38. The framework under which the OEB operates provides a practical, effective and efficient way for Indigenous groups to request and receive meaningful assurances from SCPL or the OEB about mitigating project-specific impacts on Indigenous rights and interests. The OEB has the procedural powers to implement consultation and the remedial powers to impose and enforce accommodation measures under the Act and related regulations, rules or codes. This includes the ability for the OEB to refuse to grant SCPL leave to construct in the unlikely event that OEB's view is that the duty to consult is not adequately discharged in relation to a proposed project.[30] It includes the ability for the OEB to award costs to facilitate meaningful participation of Indigenous groups in its process. And it includes the ability of the OEB to impose conditions should leave to construct ultimately be granted.

a. The comparison to the Saugeen case is not appropriate

39. HDI cites *Saugeen First Nation v. Ontario* ("***Saugeen***")[31] to support its assertion that the duty to consult has not been met in respect of the Project.

40. SCPL disagrees. *Saugeen* is clearly distinguishable on the facts from the present case.

41. The Divisional Court's findings in *Saugeen* are well summarized at paragraph 6 of that decision:

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[27] R. Macaulay et al., Practice and Procedure Before Administrative Tribunals, at § 17:18; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 (S.C.C.).
[28] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 CarswellNat 4685, 2018 FCA 153 (Fed. C.A.), at para 493.
[29] *Chippewas* at para 36.
[30] OEB, Natural Gas Facilities Handbook, March 31, 2022, at 4.4.6, online: <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2022-03/OEB-Natural-Gas-Facilities-Handbook-20220331.pdf>
[31] EB-2022-0012, HDI Submission, at para 51; *Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456, note that this case was decided prior to *Chippewas* and *Clyde River*.

"*I agree with SON that there has not been the "meaningful conversation" required by the constitutional duty to consult. The process followed by MNRF does not pass constitutional muster. From 2008 to 2011, MNRF failed to consult with SON in accordance with its own assessment of the scope of that duty. When SON learned of the Project, three and one-half years after inception, MNRF's approach was reactive and ad hoc. MNRF created expectations in SON which were disappointed repeatedly – expectations about the process to be followed and the funding available to SON. And in the end MNRF never followed through on its own designated process.*"

42. In addition, in *Saugeen*, the private sector proponent of the proposed quarry chose not to have any involvement in satisfying the procedural aspects of the duty to consult.

43. In contrast, SCPL has taken a direct and active role engaging with all affected Indigenous communities, both before and after the Ministry of Energy, Northern Development and Mines ("**MENDM**"), as it then was, issued its delegation letter on July 28, 2020.[32] Once the Application was filed, this triggered the OEB's own adjudicative process, which is anything but "reactionary and *ad hoc*". The OEB's process granted to HDI evidentiary discovery rights, the right to submit fresh evidence of its own, the right to make submissions, the right to recover prudently incurred costs, and ultimately the right to reasons.

44. In *Saugeen*, the SON had clearly identified in correspondence concerns around the specific impacts of the proposed quarry on its asserted rights. For example, the quarry was to be located adjacent to a wetland, which triggered SON concerns around several of its asserted rights including fishing rights. SON also raised concerns about archeological impacts. When SON sought capacity funding from MNRF of $16,214 to assess these concerns, MNRF then offered to fund just over half that amount. This issue remained unresolved when MNRF subsequently purported to terminate consultations.

45. By contrast, in this case HDI has not to-date identified any specific concerns around the impacts of the Project on HCCC asserted or treaty rights. See also paragraphs 26-29 above.

V. SCPL believes the evidence supports a finding that the Crown has discharged its duty to consult and accommodate in respect of the Project

46. In this case, the evidence is that there are no expected significant adverse residual impacts on Aboriginal or treaty rights resulting from the Project and, accordingly, the level of consultation and accommodation required is low.[33] The Federal Court of Appeal states that at the low end of the spectrum the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice.[34]

[32] EB-2022-0012, SCPL AIC, at paras 69-75, 81 and 90-93; EB-2022-0012, Appendix Staff-9-1; EB-2022-0012, SCPL Application, Exhibit F and Appendix 2.
[33] EB-2022-0012, SCPL Application, Appendix 1, s.4.4.10.
[34] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para 489.

47. HDI and HCCC have been given the opportunity to participate in environmental and wildlife studies, participate in archeology studies, participate in the creation of an Environmental Protection Plan, submit evidence and interrogatories, recover its prudently incurred costs, make submissions, participate in a decision-making process with an impartial decision-maker and will be provided reasons by the OEB to support whatever decision it does make in respect of this Application. These are all indicia that deep consultation has occurred and exceeded what is required in the circumstances.[35]

48. The OEB's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process.[36] The OEB is well situated to oversee consultations which seek to address the effects of a proposed project on Indigenous or treaty rights, and to use its technical expertise to assess what forms of accommodation might be available. Accordingly, SCPL submits that the OEB's regulatory process will, upon its completion, fully discharge the duty to consult and accommodate.

VI. The duty to consult is not the vehicle to address historical grievances

49. HDI asserts that the Crown must not frustrate HDI's efforts to remedy the consequences of the Crown's past failure to engage in respect of SCPL's pipeline. HDI further argues that the pipeline was built without consultation and accommodation.[37]

50. The law is clear that the duty to consult relates to the current decision under consideration, not previous decisions that may or may not have breached the duty to consult.[38]

> [41] The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue — not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration"

VII. CONCLUSION

51. The current decision under consideration by the OEB is the approval of 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's only driver is to ensure the safe and environmentally responsible operation of the pipeline and does not create additional capacity, improve operational efficiency or increase quality of service.[39]

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[35] *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, at paras 38-40.
[36] *Chippewas* at para 36.
[37] EB-2022-0012, HDI Submission, at paras 41 and 46.
[38] *Chippewas* at para 41.
[39] EB-2022-0012, SCPL IR Responses at Staff-1(2).

52. To put the Project in perspective, only 0.14 ha (0.35 acres), which is approximately the size of a hockey rink, of new permanent easement is required for the Project.

53. HDI and HCCC have not demonstrated a relationship between the Project and a potential for adverse impacts on Aboriginal claims or treaty rights. Case law indicates that past wrongs, including alleged prior breaches of the duty to consult, do not suffice.

54. As a consequence, SCPL submits that the OEB should approve the Project subject to the Conditions of Approval attached as Appendix A to OEB Staff's submissions (which conditions of approval SCPL accepts and agrees with).

55. SCPL further submits that the OEB should approve SCPL's proposed form of permanent easement agreement (attached at Appendix Staff 7-2).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22TH DAY OF JUNE, 2022

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Per:

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John Vellone
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