



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

DECISION AND ORDER

EB-2022-0012

Sun-Canadian Pipe Line Company Limited

**Application for Leave to Construct NPS 12 East Sixteen Mile Creek
Pipeline Replacement Project in the Town of Milton, Ontario**

BEFORE: Patrick Moran
Presiding Commissioner

Robert Dodds
Commissioner

David Sword
Commissioner

July 12, 2022



TABLE OF CONTENTS

| | | |
|------------|----------------------------------------|-----------|
| 1 | OVERVIEW | 2 |
| 2 | PROCESS..... | 3 |
| 3 | DECISION AND FINDINGS | 7 |
| 3.1 | NEED FOR THE PROJECT | 7 |
| 3.2 | PROJECT COST AND ECONOMICS..... | 9 |
| 3.3 | ENVIRONMENTAL IMPACTS | 10 |
| 3.4 | LANDOWNER AGREEMENTS | 11 |
| 3.5 | INDIGENOUS CONSULTATION | 13 |
| 3.6 | CONDITIONS OF APPROVAL..... | 22 |
| 4 | ORDER | 24 |
| | SCHEDULE A..... | 25 |
| | SCHEDULE B..... | 27 |

1 OVERVIEW

On January 17, 2022, Sun-Canadian Pipe Line Company Limited (Sun-Canadian, or the Applicant) applied to the Ontario Energy Board (OEB) under section 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), for an order granting leave to construct approximately 480 metres of 12-inch pipeline in the vicinity of the East Sixteen Mile Creek crossing, in the Town of Milton, Ontario (the Project). Sun-Canadian also applied to the OEB under section 97 of the OEB Act for approval of the form of easement agreement it offers to landowners for the routing and construction of the proposed pipeline (the Application).

Sun-Canadian operates a pipeline which is used to transport refined petroleum product from refineries in Sarnia to plants in London, Hamilton, and Toronto. Sun-Canadian has proposed to replace 480 metres of the existing pipeline that has become exposed where it crosses the East Sixteen Mile Creek. The general location of the Project is shown on a map in Schedule A to this decision and order.

The OEB finds that the Project is in the public interest and grants Sun-Canadian leave to construct the Project as described in the Application, subject to the Conditions of Approval, set out in Schedule B to this decision and order.

2 PROCESS

The OEB held a written hearing to consider the Application. A Notice of Hearing was issued on February 10, 2022. The Haudenosaunee Development Institute (HDI), which indicated that it has delegated authority from the Haudenosaunee Confederacy Chiefs Council (HCCC), applied for intervenor status and eligibility for an award of costs. 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 confirming that HDI was approved as an intervenor and would be eligible to apply for an award of costs under the OEB's *Practice Direction on Cost Awards*. Procedural Order No. 1 required HDI to file a letter with the OEB by April 1, 2022 indicating the areas that its proposed evidence was expected to cover, whether an expert would be retained, the estimated cost of preparing the evidence, the proposed timing for filing the evidence, and any other relevant information (HDI Evidence Letter). With respect to HDI's request for an oral hearing, the OEB stated that it would 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. Procedural Order No. 1 made provision for the filing of written interrogatories and interrogatory responses on Sun-Canadian's evidence on April 5, 2022 and April 18, respectively.

Following the issuance of Procedural Order No. 1, requests were made by HDI and Sun-Canadian for extensions of time for HDI to file the HDI Evidence Letter and interrogatories on Sun-Canadian's evidence and for Sun-Canadian to respond to interrogatories. Procedural Order No. 2 was issued on April 6, 2022, extending the time for HDI's filing of the Evidence Letter to April 8, 2022 and interrogatories to April 12, 2022 and for interrogatory responses by Sun-Canadian to April 25, 2022.

HDI filed the HDI Evidence Letter on April 8, 2022. HDI described its proposed evidence as follows:

HDI has significant concerns relating to the proposed pipeline replacement, as well as the OEB's fulfillment of its engagement obligations. HDI expects its evidence in EB-2022-0012 to cover:

1. The nature of Haudenosaunee rights in respect of the Proposed Site;
2. The nature of the harm resulting from the pipeline including, but not limited to:
 - a. Harm to Haudenosaunee rights;
 - b. Harm to the surrounding environment, including cumulative impacts;
 - c. Harm to the Haudenosaunee treaty-based relationship with the Crown, which will include evidence relating to, inter alia:
 - i. Royal Commission on Aboriginal Peoples;
 - ii. Report on Missing and Murdered Indigenous Women;
 - iii. Truth and Reconciliation Commission; and
 - iv. United Nations Declaration on the Rights of Indigenous Peoples Act;
 - d. Harm to advancing the goals of reconciliation; and
3. Sun-Canadian, OEB, and Crown engagement with the Haudenosaunee, Haudenosaunee Confederacy Chiefs Council (“HCCC”), and HDI in respect of the pipeline to date, including mitigation and compensation to address the above harms and interference with treaty rights.

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

After reviewing the HDI Evidence letter and HDI’s interrogatories, the OEB issued Procedural Order No. 3 on April 18, 2022. In that order, the OEB stated that HDI’s 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, along with a description of those impacts.

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

Procedural Order No. 3 provided for the filing of HDI's evidence on May 6, 2022 and for the filing of interrogatories on HDI's evidence by May 13, 2022 and also made provision for the filing of final submissions on the Application.

In a letter dated April 26, 2022, HDI expressed concern with the OEB's approach to the duty to consult and the timeline provided for the filing of its evidence.

The OEB issued Procedural Order No. 4 on April 29, 2022, stating that it is proceeding in a manner that is consistent with the Crown's duty to consult. The OEB noted that HDI had not yet provided details about what aspects of the Project are of concern in relation to the constitutionally protected rights of the Haudenosaunee. The OEB stated that it expected HDI's evidence to address the following matters – whether Sun-Canadian failed to engage with HDI, whether Sun-Canadian failed to address specific concerns raised by HDI and whether the Project impacts Aboriginal or treaty rights of the Haudenosaunee.

The OEB extended the date for HDI to file its evidence to May 13, 2022, noting the extensions already granted to HDI. This extension allowed for five weeks from the date HDI filed the HDI Evidence Letter to complete the preparation of its evidence. The OEB also addressed HDI's request for an oral hearing, stating that it is of the view that an oral hearing was not necessary in the context of the Application. The remaining procedural dates were adjusted as a result of the additional week provided to HDI to file its evidence.

On May 13, 2022, HDI filed its evidence. Sun-Canadian and OEB staff filed interrogatories on HDI's evidence on May 20, 2022. Sun-Canadian filed a confidentiality request that related to certain sections of HDI's form of Engagement Agreement which Sun-Canadian had included as part of its interrogatories to HDI.

On May 27, 2022, the OEB issued Procedural Order No. 5 granting the confidentiality request from Sun-Canadian and requested HDI to confirm if HDI wanted its form of Engagement Agreement to be treated on a confidential basis.

HDI filed responses to interrogatories on June 1, 2022. On June 7, 2022, HDI confirmed that it consented to the confidential treatment of the proposed redactions of HDI's form of Engagement Agreement and interrogatories relating to those redactions.

Sun-Canadian filed its Argument-in-Chief on June 8, 2022. HDI and OEB staff filed written submissions on June 15, 2022. Sun-Canadian's final argument was filed on June 22, 2022.

On June 22, 2022, HDI filed a letter in which it objected to certain submissions made by OEB staff, and asked that these submissions be disregarded. On June 28, Sun-Canadian filed a letter objecting to HDI's letter on the basis that it was improper sur-reply.

On June 30, 2022, the Applicant filed a letter received from the Ontario Ministry of Energy regarding the Indigenous consultation undertaken for the Project. The letter advised that the Ministry of Energy was "of the opinion that the procedural aspects of consultation undertaken by SCPL to-date for the purposes of the Ontario Energy Board's Leave to Construct for the East Sixteen Mile Crossing Replacement project are satisfactory."¹

¹ Ministry of Energy Letter of Opinion, June 28, 2022

3 DECISION AND FINDINGS

In considering whether the Project is in the public interest, the OEB has considered the following issues:

- Need for the Project
- Project Cost and Economics
- Environmental Impacts
- Landowner Agreements
- Indigenous Consultation
- Conditions of Approval

3.1 Need for the Project

Sun-Canadian operates a pipeline that delivers refined petroleum products from refineries in Sarnia to plants in London, Hamilton, and the Toronto area. The pipeline was established in 1953.

Sun-Canadian's 2019 annual water survey identified three locations with low or no cover where the pipeline crosses East Sixteen Mile Creek in Milton, Ontario. At that time, Sun-Canadian implemented mitigation measures to temporarily stabilize and protect the pipeline infrastructure. Sun-Canadian stated that the Project is needed to maintain compliance with section 4.11 of the Canadian Standards Authority standard CSA Z662-19 which requires water crossings to be buried to a depth of at least 1.2 metres below the water body.

The Project is intended to replace approximately 480 metres of the existing pipeline with a new section of pipe where it crosses East Sixteen Mile Creek, which will be installed at a depth that will eliminate the identified areas of shallow depth of cover. The planned construction is to be undertaken using horizontal directional drilling. The existing section will be decommissioned by isolating it, removing any remaining product from it, capping it, and filling it with concrete.

In response to OEB staff interrogatories, Sun-Canadian provided a description of the alternatives considered, stating that although line replacement through horizontal directional drilling is the highest-cost option, it provides the most effective long-term

protection of the water crossing and results in the least amount of construction impact on the local environment, the creek, and impacted landowners.²

Sun-Canadian noted that timing of the construction is constrained by the permitted construction window of July 1 to September 15 which was established to protect sensitive life stages for Silver Shiner, and fish in general, based on communications with the Ministry of Environment, Conservation and Parks. If work cannot be completed within this construction window, the work would have to be delayed until July 2023.

Sun-Canadian noted that postponement of construction to July 2023 would require work to address the existing mitigation measures installed in 2019. Sun-Canadian stated that it would need to obtain emergency permits from both federal and provincial agencies to complete this work which would require in-water activities, potentially resulting in impacts to aquatic and terrestrial environments in the creek valley.

OEB staff submitted that there is a need for the Project and supported Sun-Canadian's proposal as the best option to meet the stated need, in terms of long-term reliability and safety and minimizing impact on landowners and the environment.

Findings

The OEB finds that the Project is needed.

The evidence establishes that there are three sections of the existing pipeline with low or no cover where it crosses East Sixteen Mile Creek that pose potential risk to the creek and the integrity of the pipeline. The Project addresses this risk appropriately, in compliance with the CSA requirement, and allows for the continued safe operation of the pipeline.

The OEB accepts that action by Sun-Canadian was required at this point to ensure the well-being and integrity of the pipeline. The Project avoids the need for temporary and emergency type mitigation measures that would be required this summer and the potential environmental impacts from those emergency measures.

² Sun-Canadian IRR – OEB Staff -2, p.5

3.2 Project Cost and Economics

Sun-Canadian is a non-rate regulated private enterprise, and it will finance and pay for the Project. There will be no cost impact on ratepayers.

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

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.³

OEB staff agreed with Sun-Canadian's rationale regarding non-disclosure of the Project costs and submitted 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 therefore will not be passing any costs on to ratepayers through OEB approved rates.

Findings

The OEB does not need to consider the Project costs as part of its review of this application.

A review of project costs and an economic feasibility assessment would be required to assess the impact on ratepayers if those costs are being recovered from ratepayers. Sun-Canadian uses the pipeline to deliver refined petroleum products for its owners from refineries in the Sarnia area to marketing plants in London, Hamilton, and the Toronto area and does not recover the cost to operate and maintain the pipeline through OEB approved rates. Furthermore, the pipeline is not used for the transmission or distribution of natural gas. It is therefore not subject to rate regulation by the OEB. On this basis, it is not necessary to review the Project costs or require an economic feasibility assessment. The cost of the Project will be fully financed by Sun-Canadian and no costs will be passed on to ratepayers through OEB approved rates.

³ EB-2019-0007 Decision and Order, p.5

3.3 Environmental Impacts

Sun-Canadian retained Stantec Consulting Ltd (Stantec) to conduct an environmental and socio-economic study and public consultation, and to complete an Environmental Report, as required by the OEB's *Environmental Guidelines for Location, Construction and Operation of Hydrocarbon Pipelines in Ontario* (Environmental Guidelines).

The Environmental Report identified the environmental and socio-economic features along the route of the proposed pipeline. 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 of the Ontario Pipeline Coordinating Committee, municipalities, and Indigenous communities.

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 also committed to developing a project specific Environmental Protection Plan that will build on the mitigation measures and the monitoring and contingency plans identified within the Environmental Report, prior to construction.

OEB staff submitted that it had no concerns with the environmental aspects of the Project, based on Sun-Canadian's commitment to implement the mitigation measures set out in the Environmental Report and to complete the Environmental Protection Plan prior to the start of construction. OEB staff also submitted that Sun-Canadian's compliance with the conditions of approval proposed by staff will ensure that impacts of pipeline construction are mitigated and monitored and will also require Sun-Canadian to obtain all necessary approvals, permits, licences, and certificates needed to construct, operate and maintain the Project.

Findings

The OEB finds that the environmental aspects of the Project have been assessed appropriately. The Applicant has conducted its environmental review and public consultation process in accordance with the OEB's Environmental Guidelines. The Environmental Report and consultation records establish that the Applicant engaged appropriately with Indigenous communities (see further discussion below), landowners, and all relevant federal and provincial agencies and authorities. Subject to the discussion on Indigenous consultation section below, no one has challenged the

conclusions reached in the work done by the Applicant to assess the environmental impacts of the Project and the proposed mitigation of construction impacts. The Applicant entered into environmental and archeological monitoring agreements with HDI and has agreed to the participation of representatives of the Huron-Wendat Nation, the Mississaugas of the Credit First Nation and Six Nations of the Grand River in monitoring the construction from an environmental and archeological perspective.

Any environmental impacts of the Project are temporary, making use of a construction approach that limits the surface disturbance to a horizontal directional drill entry and exit point on one existing and one proposed private landowner easement.

The OEB notes that the mitigation measures set out in the Environmental Report as prepared by Stantec Consulting Ltd requiring Sun-Canadian to obtain and adhere to all the necessary permits and approvals needed to construct, operate and maintain the Project are adequate to avoid or reduce potential impacts on the environment as a result of this Project, subject to the Conditions of Approval, set out in Schedule B to this decision and order.

3.4 Landowner Agreements

The existing pipeline occupies a right-of-way that is shared with owners and operators of other utilities. The replacement pipeline segment is parallel to the existing pipeline alignment and is predominantly within the existing right-of-way.

Sun-Canadian stated that the Project will require the use of the existing easement, as well as two new permanent easements and three access and temporary workspace easements. The existing easement will be used for approximately 300 metres of the new alignment, including the crossing of Trafalgar Road. The new permanent easements affect two privately owned properties. Sun-Canadian stated that the owners of these properties have the existing pipeline on their properties and have provided confirmation of the landowners' willingness to enter into new easement agreements.⁴ The required access and temporary workspace affects the two privately owned lands and one municipally owned property. Sun-Canadian stated that it has existing easements on all three parcels of land for the existing pipeline and will secure the temporary workspaces through the existing easement agreements. No new landowners will be affected.

⁴ Sun-Canadian IRR, OEB Staff-7, Appendix -7-1

Sun-Canadian filed a form of permanent easement agreement for the OEB's approval. In response to interrogatories, Sun-Canadian stated that the proposed form of easement agreement is substantially similar to the sample forms of agreement referenced in the OEB's *Natural Gas Facilities Handbook* (Handbook).⁵ Sun-Canadian stated that its proposed easement agreement includes provisions that are sufficient to govern temporary access to the easement lands and thus obviates the need for a separate temporary access agreement.

OEB staff submitted that Sun-Canadian is appropriately managing land related matters. OEB staff also submitted 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 and addresses the new permanent easements and the access and temporary workspace required, given that the same landowners are affected.

Findings

The OEB approves the form of easement agreement as proposed by Sun-Canadian.

Sun-Canadian's proposed form of easement agreement is consistent with the forms of agreements that are provided in the Handbook. The OEB is satisfied that the proposed form is suitable for both the permanent and temporary easements required for the Project

The OEB notes that the new permanent easements that are required are on two privately owned parcels that already have existing Sun-Canadian pipeline easements in place and that both property owners have indicated their general support for both the Project and the new easement agreement.

⁵ Sun-Canadian IRR, OEB Staff-7, p.16

3.5 Indigenous Consultation

Background

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

The Ministry of Energy issued a letter (Delegation Letter) on July 28, 2020 delegating the procedural aspects of the Crown's duty to consult to Sun-Canadian, stating:

Based on the Crown's assessment of First Nation and Métis community rights and potential project impacts, the following Indigenous communities should be consulted on the basis that they have or may have constitutionally protected Aboriginal or Treaty rights that may be adversely affected by the Project.

The Delegation Letter identified the following Indigenous communities to be consulted:

- Huron-Wendat Nation
- Mississaugas of the Credit First Nation
- Six Nations of the Grand River

In the Delegation Letter, the Ministry of Energy noted that for Six Nations of the Grand River, consultation was required with both the Six Nations Elected Council and Haudenosaunee Confederacy Chiefs Council (HCCC) and stated that all correspondence with HCCC should be copied to HDI.

Each of these Indigenous communities and the Métis Nation of Ontario were directly served the Notice of Hearing for the Project, 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." While HDI was not served directly, in its intervention request letter dated March 7, 2022, it indicated that it was responding on behalf of HCCC to the OEB's Notice.

As required by the Environmental Guidelines, Sun-Canadian provided its Indigenous Consultation Report for the Project as part of the Application and also provided updated consultation summary tables as requested by OEB staff through interrogatories.

In its final argument, HDI argued that the application should be denied on two grounds: that the Crown failed to obtain the consent of the Haudenosaunee as required, in HDI's view, by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and that the Crown and the proponent had failed to meaningfully engage with the Haudenosaunee with respect to the Project. HDI also offered critiques of the OEB's hearing process and its ability to properly assess the duty to consult.

Both Sun-Canadian and OEB staff submitted that the OEB's process was suitable for assessing the duty to consult with respect to the Project. They further argued that the Project does not appear to give rise to any adverse impacts to Aboriginal or treaty rights, and that the OEB can therefore be satisfied that the duty to consult has been met.

On June 30, 2022, the Applicant filed a letter received from the Ontario Ministry of Energy regarding the Indigenous consultation undertaken for the Project. The letter advised that the Ministry of Energy was "of the opinion that the procedural aspects of consultation undertaken by SCPL to-date for the purposes of the Ontario Energy Board's Leave to Construct for the East Sixteen Mile Crossing Replacement project are satisfactory."⁶

Findings

The OEB finds that, to the extent that the duty to consult has been triggered by the Project, it has been discharged sufficiently to allow the OEB to approve the Project.

In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (Clyde River), the Supreme Court of Canada summarized the duty to consult (and, where required, to accommodate) as follows:

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,

⁶ Ministry of Energy Letter of Opinion, June 28, 2022

indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible.⁷

The Supreme Court has confirmed that the Crown may discharge its duty to consult through an existing statutory tribunal process, provided the tribunal possesses the statutory powers to consider issues of law and that it has the remedial powers to do what the duty to consult requires in the particular circumstances.⁸

In this case, the OEB's approval authority over the Project constitutes Crown conduct insofar as a leave to construct approval would allow the Project to proceed (subject to Sun-Canadian also obtaining any other required permits and approvals).

Section 4(4) of the OEB Act provides that "The Board is an agent of Her Majesty in right of Ontario, and its powers may be exercised only as an agent of Her Majesty."

Section 19(1) provides that: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact."

Section 23(1) provides that: "The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application."

These provisions ensure that the OEB has the statutory powers necessary to address issues arising from the duty to consult and the remedial powers to provide any resulting relief that may be required - the OEB may grant an approval with appropriate conditions or deny the application as may be required to address those issues.

In advance of filing an application for leave to construct with the OEB, the OEB's Environmental Guidelines require proponents to contact the Ministry of Energy to obtain direction on what Indigenous communities should be consulted in relation to a project. In the present case, the Applicant contacted the Ministry of Energy in 2020. As noted above, the Ministry of Energy subsequently issued a Delegation Letter to the Applicant dated July 28, 2020.

⁷ 2017 SCC 40 (CanLII), para. 25.

⁸ See *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.), at para. 32, and *Clyde River*, para. 30.

On February 10, 2022, the OEB issued its Notice of Hearing and letter of direction to the Applicant for service and publication of the Notice. The Applicant served the Notice on the Indigenous communities. The Notice included the following statement:

The 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.

Based on the consultation records filed by the Applicant, it is clear that the Applicant provided a reasonable opportunity for Indigenous communities to engage in meaningful conversation about the Project.

In September and October of 2020, the Applicant met with Huron-Wendat Nation, Mississaugas of the Credit First Nation and Six Nations of the Grand River to obtain input into the Environmental Report. Although invited, HCCC and HDI did not participate.

In November and December 2020, the Applicant invited the Indigenous communities and HDI to participate in the Stage 1 Archaeological Assessment and habitat studies. HDI stated that they wish to participate in the ecology surveys and the Applicant responded, explaining its process regarding arrangements for a monitor on the field survey work. The Applicant also provided a copy of the draft Stage 1 Archaeological Report for review by Indigenous communities and HDI. The Indigenous communities and HDI responded, stating that they did not have any comments on the Report.

In February 2021, the Applicant provided a draft of the Environmental Report to all the Indigenous communities and HDI and requested their comments. In October 2021, HDI advised the Applicant it had concerns about the Project. The Applicant met with HDI to discuss these concerns and the arrangements regarding environmental monitors. Agreements for archeological and environmental monitoring were executed between the Applicant and HDI in January 2022 and March 2022, respectively.

According to the consultation log, in February and March 2022, Huron-Wendat Nation requested to have a construction monitor present during the construction and the Applicant and Huron-Wendat Nation agreed on the arrangements for the monitor. In April 2022, at the request of Mississaugas of the Credit First Nation, a consultation meeting was held with the Applicant to provide a status update on the Project and to address any questions or concerns from the Mississaugas of the Credit First Nation.

The Applicant also met with Six Nations of the Grand River in April 2022 to discuss Six Nations of the Grand River's specific concerns related to the environmental impacts and opportunities for environmental monitors.

In May and June 2021, Sun-Canadian invited the Indigenous communities and HDI to participate in the Stage 2 Archaeological Assessment. HDI, Huron-Wendat Nation and Six Nations of the Grand River were each engaged in discussions with Sun Canadian regarding the field study work, findings and recommendations and no concerns were raised. The Indigenous communities also did not have any comments on the draft Stage 2 Archaeological Report that the Applicant provided to them in June 2021.

In March 2022, a meeting was held between HDI and the Applicant to discuss concerns that HDI had regarding the Project. In April 2022, HDI provided the Applicant with a draft Engagement Agreement. The Applicant did not execute the Engagement Agreement stating that the agreement went beyond the scope of its obligations as it relates to fulfilling the procedural aspects of the duty to consult for the Project. The Applicant stated that the agreement would give HDI an effective veto over the Project. HDI subsequently stated that it is unable to comment on the impacts of the Project in the absence of an executed Engagement Agreement.

As the delegate of HCCC, HDI has taken the position that engagement with HCCC and HDI has been inadequate, and the Crown has failed to engage meaningfully with HDI. HDI asserts this on the basis that the Crown is obligated to obtain free, prior and informed consent from the Haudenosaunee before granting leave to construct, based on UNDRIP.

HDI argued that the Haudenosaunee cannot give their consent because the Crown has failed to "1) conduct a preliminary assessment of the strength of the case supporting the existence of Haudenosaunee right(s), and the impact of the Project thereon; 2) disclose information or discuss issues raised by the Haudenosaunee, as required even on the low end of the engagement spectrum; and 3) provide a meaningful process to the Haudenosaunee for engagement.."

HDI's assertion that the Crown has failed to engage meaningfully with HDI on the basis that the Crown is obligated to obtain free, prior and informed consent from the Haudenosaunee before granting leave to construct, based on UNDRIP, must fail for the following reasons:

-
- (a) The Applicant provided project information and a reasonable opportunity for HDI to provide input on its concerns over a period of a year and a half
 - (b) HDI failed to provide any input to the Applicant of any impact the Project might have on the Haudenosaunee's constitutionally protected rights despite a clear invitation and a reasonable opportunity to do so from the Applicant
 - (c) The OEB provided HDI with a reasonable opportunity to engage with the OEB through the hearing process which included:
 - a. granting HDI intervenor status
 - b. granting eligibility for a cost award to cover the cost of its participation in the hearing
 - c. providing an opportunity for HDI to ask interrogatories on the Applicant's evidence and
 - d. providing an opportunity for HDI to file its own evidence and submissions, along with granting HDI the extensions it requested
 - (d) HDI failed to provide evidence to the OEB of any impact the Project might have on the Haudenosaunee's constitutionally protected rights, as part of the hearing process, despite the procedural orders that set out clearly the opportunity to do so.

In the absence of any evidentiary foundation, it is not necessary for the OEB to decide the issue of whether consent is required from the Haudenosaunee.

Based on the evidence filed by HDI, the OEB accepts that the Haudenosaunee have certain treaty rights in the area of the Project. The OEB has been clear throughout the process that it would consider the degree to which the Project might impact these rights and what if any mitigation measures or other remedies might be appropriate. In Procedural Order No. 4, for example, the OEB stated:

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

The OEB provided every opportunity for HDI to engage in the process to identify what impacts the Project might have on the Haudenosaunee's constitutionally protected rights. For example, in Procedural Order No. 4 the OEB stated:

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.

Ultimately, while HDI provided evidence relating to its Aboriginal and treaty rights, HDI provided no meaningful evidence that the Project would impact those rights. The lack of evidence of any potential harm presents a fundamental deficiency in the HDI submission that the consultation was inadequate, particularly when considering the Project is only a 480 meter pipe replacement with very minor temporary construction impacts associated with horizontal directional drilling.

The duty to consult requires both the Crown and Indigenous communities to consult in good faith. As stated by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*:

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, 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.⁹

The OEB's hearing process, in conjunction with the requirements in the Environmental Guidelines and the Ministry of Energy's delegation of the procedural aspects of the duty

⁹ 2004 SCC 73, para. 42 (citations removed).

to consult to Sun-Canadian, has provided a coherent process for meaningful engagement and consultation to take place.

The process has included:

- early pre-application identification of potentially impacted Indigenous communities by the Ministry of Energy
- delegation by the Ministry of Energy of procedural aspects of the duty to consult to Sun-Canadian
- outreach and communication by Sun-Canadian with the Indigenous communities that had been identified by the Ministry of Energy
- the preparation of an Indigenous Consultation Report that described the results of these communications, including a summary of any rights-based concerns that were raised and any accommodations that were proposed
- direct notice of the application to potentially impacted Indigenous communities
- the granting by the OEB of intervenor status, opportunity to file evidence, and eligibility to apply for an award of costs to HDI
- a thorough interrogatory process relating to the evidence filed by the Applicant;
- the submission of evidence by HDI and associated interrogatories and
- the opportunity to present final argument to the OEB.

The OEB finds that Sun-Canadian acted diligently in reaching out to all of the potentially impacted Indigenous communities identified in the Delegation Letter, along with HDI, and was successful in achieving a meaningful conversation with everyone except HDI. The Notice was also served on Métis Nation of Ontario who did not participate in the proceeding.

As detailed in its evidence and submissions, Sun-Canadian made numerous attempts to engage with HDI to discuss the Project, including with respect to any impacts the Project could have on Aboriginal or treaty rights. Despite the opportunity to do so over a period of two years, including entering into two agreements with Sun-Canadian to address environmental and archeological issues, and being granted intervenor status and eligibility for costs, there has been little meaningful engagement by HDI on the Project and what implications it could have with respect to constitutionally protected rights.

HDI argues that the Haudenosaunee were never consulted before the original pipeline was constructed in 1953 and therefore have never had an opportunity to assess the impact of the pipeline, as a whole on their treaty rights. However, as stated by the Supreme Court:

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.¹⁰

HDI has provided no evidence that such is the case for the Project.

HDI has chosen to focus largely on what it describes as procedural rights to insist on a process that requires the Applicant to enter into a specific form of engagement agreement rather than engaging in the available process to raise any Project related concerns that may exist.

HDI stated in its interrogatory responses that it would oppose the Project unless an engagement agreement was concluded.¹¹ A requirement to enter into a specific form of engagement agreement as a condition for engagement does not represent a reasonable, good faith attempt on the part of HDI to engage on issues related to the Project through this process, in the face of Sun-Canadian's willingness to engage.

In this context the OEB finds that the duty to consult has been discharged sufficiently to allow it to approve the Project. In coming to this conclusion, the OEB notes that the Ministry of Energy issued a letter of opinion to the Applicant, dated June 28, 2022, which was filed with the OEB on June 30, 2022. In that letter, the Ministry of Energy expressed its opinion that the Applicant had carried out the consultation activities required by the Ministry of Energy's Delegation Letter satisfactorily. The OEB has carried out its own review of these activities, along with all the evidence and submissions received from the Applicant and HDI, to form its own opinion that the duty to consult has been properly discharged in the context of the Project.

¹⁰ *Rio Tinto Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), para. 49.

¹¹ HDI IR Responses, Staff-1(5).

HDI's letter asking the OEB to disregard certain OEB Staff submissions

In a letter to the OEB dated June 22, 2022, HDI expressed concerns regarding a submission that OEB staff made as part of OEB staff's review of the application. HDI stated that it was 'inappropriate for Board Staff to make statements, submissions, and/or recommendations to the Board insofar as the honour of the Crown is at stake.'

The OEB notes that as part of the regulatory review process, along with the proponent and intervenors, OEB staff make submissions for the OEB to consider. The submissions are made public and form part of the official record posted on the OEB website along with all documentation related to the application, in the interests of transparency and accountability. As with the proponent, intervenors and interested parties, OEB staff may make comment on any issue under consideration in any given application that is before the OEB.

Like all submissions received, OEB staff submissions are not determinative of any issue to be decided by the OEB. The OEB considers the entire record of proceeding, including the submissions received, and it is for the OEB to determine the issues raised in an application.

3.6 Conditions of Approval

The OEB has established standard conditions of approval for natural gas related leave to construct applications.¹²

As part of interrogatories, OEB staff suggested that the standard conditions of approval for leave to construct applications should apply to the Project with the 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. Sun-Canadian agreed with this suggestion.¹³

Sun-Canadian proposed a modification to Section 2(b)(i) of the conditions of approval, requesting that notification to the OEB of the commencement of construction be

¹² OEB *Natural Gas Facilities Handbook, Appendix D*

¹³ Sun-Canadian IRR, OEB Staff-10, p.26

amended from 10 days to three days as it intends to begin construction soon after leave to construct is granted.

OEB staff supported Sun-Canadian's proposed amendment and submitted that the OEB should approve the Project subject to the conditions of approval proposed in OEB staff's submission.

Findings

The OEB approves the standard conditions of approval with the 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, this condition is not required.

Sun-Canadian's proposed modification to Section 2(b)(i) of the conditions of approval, which changed the timing for notification to the OEB of the commencement of construction from 10 days to three days, is also approved.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

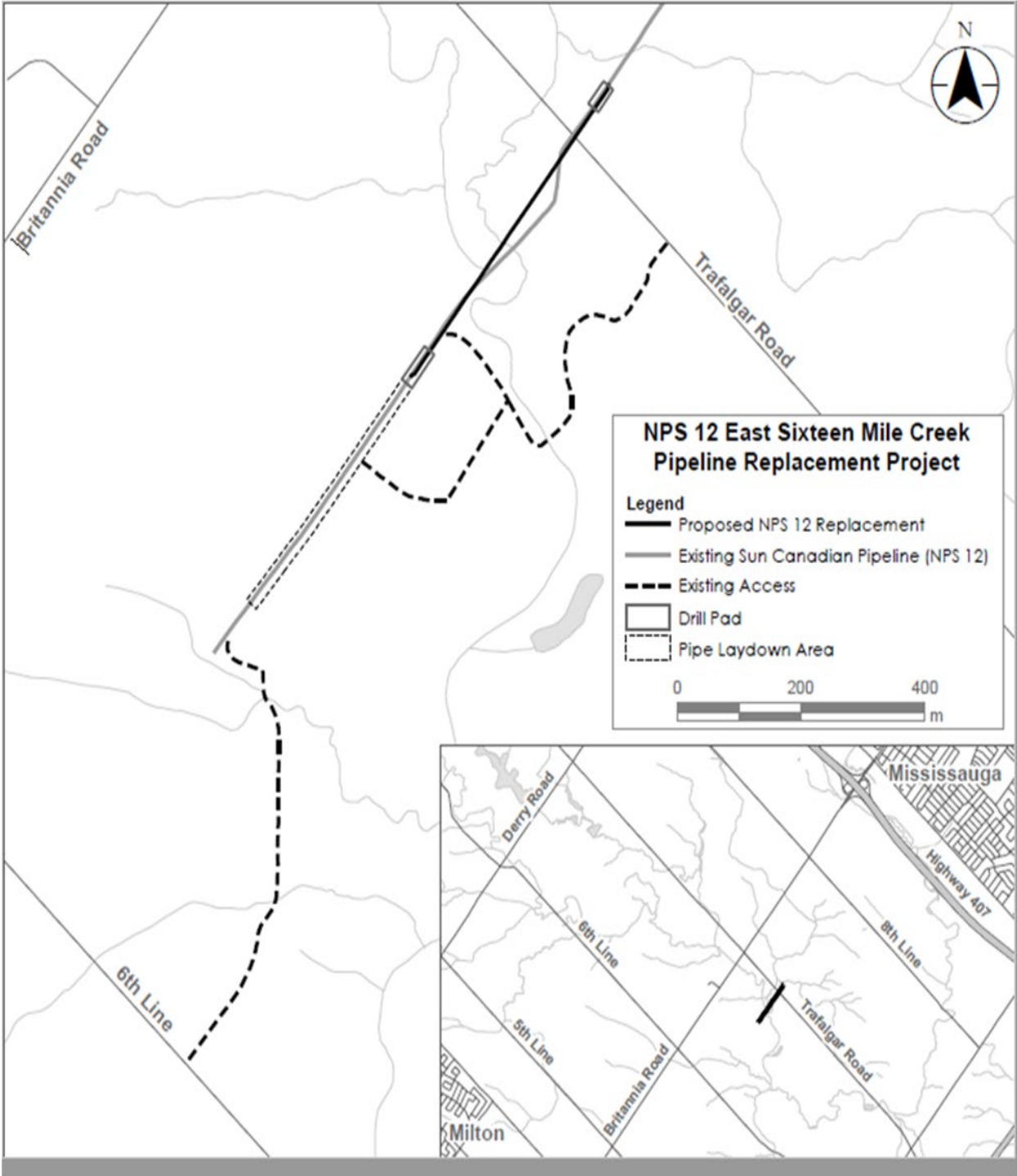
1. Sun-Canadian Pipe Line Company Limited is granted leave, pursuant to section 90(1) and 96(1) of the OEB Act, to construct approximately 480 metres of 12-inch pipeline in the vicinity of the East Sixteen Mile Creek crossing, in the Town of Milton, Ontario as described in the Application.
2. Pursuant to section 97 of the OEB Act, the OEB approves the form of easement agreement that Sun-Canadian has offered or will offer to each owner of land affected by the Project.
3. Leave to construct is subject to Sun-Canadian complying with the Conditions of Approval set out in Schedule B.
4. The Haudenosaunee Development Institute (HDI) shall file with the OEB and forward to Sun-Canadian its cost claim in accordance with the OEB's *Practice Direction on Cost Awards* on or before **July 19, 2022**.
5. Sun-Canadian shall file with the OEB and forward to HDI any objections to the claimed costs of HDI on or before **July 26, 2022**.
6. If Sun-Canadian objects to any of HDI's costs, HDI shall file with the OEB and forward to Sun-Canadian its responses, if any, to the objections to its cost claim on or before **August 2, 2022**.
7. Sun-Canadian shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto July 12, 2022

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar

SCHEDULE A
DECISION AND ORDER
SUN-CANADIAN PIPE LINE COMPANY LIMITED
EB-2022-0012
JULY 12, 2022



SCHEDULE B
DECISION AND ORDER
SUN-CANADIAN PIPE LINE COMPANY LIMITED
EB-2022-0012
JULY 12, 2022

**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 Pipe Line Company Limited (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 3 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
 - ii. Sun-Canadian adherence to Condition 1
 - iii. describe any impacts and outstanding concerns identified during construction
 - iv. describe the actions taken or planned to be taken to prevent or mitigate any identified impacts of construction
 - 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, the rationale for taking such actions
 - vi. 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 3
 - 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 action.

- 7. Sun-Canadian shall designate one of their 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.