



Ontario
Energy
Board | Commission
de l'énergie
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DECISION AND ORDER ON COST AWARDS

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

September 15, 2022

OVERVIEW

Sun-Canadian Pipe Line Company Limited (Sun-Canadian) applied to the Ontario Energy Board (OEB) on January 17, 2022, 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 (Project). Sun-Canadian also applied to the OEB for approval of the form of land use agreements it offers to landowners for the routing and construction of the proposed pipeline.

The OEB granted Haudenosaunee Development Institute (HDI) intervenor status and eligibility to apply for an award of costs.

On July 12, 2022, the OEB issued its Decision and Order in which it granted Sun-Canadian leave to construct the Project and set out the process for addressing cost claims.

HDI filed a cost claim. No objection was received from Sun-Canadian to that cost claim.

Findings

As noted in Procedural Order No. 1, eligibility to apply for an award of costs does not guarantee recovery of any costs claimed.

The OEB has reviewed HDI's cost claim having regard to the OEB's *Practice Direction on Cost Awards* (Practice Direction), section 5.01 of which contains a non-exhaustive list of factors considered by the OEB in determining the amount of a cost award. Among the factors are whether the party contributed to a better understanding by the OEB of one or more issues in the proceeding, and whether the party's participation in the proceeding, including its evidence, interrogatories and cross-examination, was focused on relevant and material issues.

HDI's total cost claim is for \$41,276. This is comprised of \$36,776 in legal fees and \$4,500 in consultant's fees for an affidavit that was prepared by Dr. Aiden Hollis. For the reasons set out below, the OEB has determined that a significant portion of the evidence and submissions prepared by HDI was not relevant to the issues that were engaged in this proceeding and did not contribute to a better understanding of the issues in the proceeding. Therefore, the OEB has determined that it will reduce the claimed costs by \$16,276. The total approved award of costs is \$25,000.

In Procedural Order No. 3, the OEB confirmed that it has the responsibility to ensure that the duty to consult, where triggered, has been adequately discharged with respect

to a natural gas infrastructure project, and stated that to the extent that HDI raised any concerns regarding the adequacy of consultation with respect to the Project, the OEB would consider those concerns and make a determination based on the record that was before it. In making provision for HDI to file evidence, the OEB stated:

Evidence related to the duty to consult should address the Aboriginal or treaty rights of the Haudenosaunee that may be directly impacted by the Project described above, along with a description of those impacts. The OEB will not consider matters that do not relate directly to the impacts of this Project itself on Aboriginal or treaty rights. To the extent that the filed evidence goes beyond the impacts of the Project, the OEB may deny a costs claim.

In Procedural Order No. 4, the OEB reiterated that it would consider whether the Project has an impact on constitutionally protected rights and indicated that if HDI believed that the Project may impact Aboriginal or treaty rights, the OEB expected HDI to provide evidence that identified those rights and explained how they may be impacted.

HDI's evidence and submissions focused on the treaty rights of the Haudenosaunee and HDI's perspective on the duty to consult and Indigenous engagement but did not discuss how any claimed rights would be impacted by the Project. An interrogatory response from HDI with respect to its evidence further confirmed that HDI had not conducted an assessment of any impacts related to the Project.¹

The OEB provided every opportunity for HDI to engage in the process to identify what impacts the Project might have on constitutionally protected rights through interrogatories to the applicant, through filing its own evidence, and through final argument. At no point did HDI identify any specific impacts that the Project could have on any Aboriginal or treaty rights. As noted in the July 12 Decision and Order:

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.

¹ HDI response to OEB staff interrogatory 2.

It appears, therefore, that much of the time claimed by HDI's counsel and consultant did not directly address the matters that were identified by the OEB and did not contribute to a better understanding of the issues in the proceeding. The OEB has therefore determined that it would not be appropriate to require Sun-Canadian to pay the full amount of the costs claimed by HDI. The OEB will approve an award of costs in the amount of \$25,000, which represents a disallowance of \$16,276, or approximately 40%.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Sun-Canadian Pipe Line Company Limited shall immediately pay Haudenosaunee Development Institute \$25,000.

DATED at Toronto September 15, 2022

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar