



## Haudenosaunee Development Institute

November 5, 2018

**Jessie Malone, P.Eng**

**Environmental and Regulatory Advisor**

Safety Security Health and Environment, Imperial

505 Quarry Park Blvd. SE, Calgary, AB T2C 5N1

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ONTARIO ENERGY BOARD

Dear Ms. Malone:

**RE: Waterdown to Finch Project ('Project')**  
**Our File No.: 030-126-003**

Thank you for meeting with us on October 25, 2018. It was a pleasure meeting you and your team.

### Introduction

As you are aware we requested the meeting further to Mr. Ballinger's letter of September 20, 2018 (received on September 24, 2018) which set out Imperial's intention to proceed with the Project. In this regard, we make reference to the Supreme Court of Canada in *Delgamuukw* where the court stated at paragraph 168 that:

Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

As you are aware the *United Nations Declaration on the Rights of Indigenous Peoples* also speaks to consent at Article 19 where it states that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

### OUR LAND, OUR LAW, OUR PEOPLE, OUR FUTURE

### September 20, 2018 Imperial Correspondence

Receipt of your letter on or about September 24, 2018 was the first notification we received in relation to the Project.

We indicated that the Crown, and specifically, the Ministry of Energy, Mines and Northern Development ('Ministry') had not provided any notification in relation to the Project, despite knowledge, both real and constructive, that the Project would impair, interfere with, and otherwise infringe upon Haudenosaunee rights and interests including the Haudenosaunee's unsundered title interests upon the land where the Project is intended.

Mr. Ballinger's correspondence makes reference to a delegation of the procedural aspects of engagement. We confirm that this has raised serious concerns from our perspective in relation to the Honour of the Crown.

We indicated that the Crown is obligated to undertake a *prima facie* assessment of rights and interest's prior to delegating procedural aspects of engagement. As we have not been contacted in advance of the delegation there are questions as to the whether, the Crown has undertaken any such assessment and thereby properly discharged its obligations.

We confirm that we made the request that work on the Project be put on hold until such time as the Crown establishes that it has discharged its obligations and/or actually undertakes the *prima facie* assessment to determine the required nature and scope of engagement and what aspects can be delegated.

We confirm that the Ministry has provided you with letter setting out the delegation of the Crown's obligations and we confirm that you have advised that you will provide this correspondence. At the same time, we have requested all of the correspondence, memos, emails and other documents in your power possession and control passing between Imperial and the Crown which deal with Haudenosaunee engagement. We require these documents to understand how and when Haudenosaunee treaty rights and interest have been considered in determining the nature and scope of the purported engagement.

At the same time, we have also asked for all of Imperial's internal documents which may have been generated in response to the Minister's purported delegation. Imperial now stands in the shoes of the Crown and we require these documents to determine how Haudenosaunee treaty rights and interests have been considered, and at the same time, to meet the Haudenosaunee's reciprocal engagement obligations which require the Haudenosaunee to set out and clarify rights and interests. We require these documents without prejudice to our position that the exchange of documents, the review of rights and interests and the setting out and clarification of rights and interests was properly to have occurred prior to any purported delegation.

We would also note that this particular matter engages established treaty rights. As you may be aware the infringement of treaty rights is only lawful where it is justified and the Supreme Court of Canada has set out the basis for that justification. Notably, the justification involves the

discharge of fiduciary obligations on the part of the Crown. As you may be aware it is unlawful in most circumstances to delegate fiduciary obligations without the consent of the beneficiary – the Haudenosaunee Confederacy Chiefs Council.

We confirm that we have also asked Imperial to submit an application, and the associated fee, to the HDI (the standardized form is available from our website).

We confirm that a number of Crown actors are going to be granting approvals with respect to the Project and we have asked how and when engagement is to occur with respect to those approvals, and at the same time, whether there have been any further delegations.

For your ease of reference, we will require engagement from/with:

- Ontario Energy Board
- Infrastructure Ontario
- Niagara Escarpment Commission
- Ministry of Natural Resources and Forestry
- Ministry of Tourism Culture and Sport
- Ministry of Environment, Conservation and Parks
- Conservation Authorities (Please provide us with a list of the Conservation Authorities and we will be in touch with them directly to determine how they are proposing to discharge their obligations)
- Fisheries and Oceans Canada
- HONI; and
- IO

We have copied all of the above and would like to take the opportunity in this letter to formally request that the above contact our offices with respect to commencement of the engagement process.

### **Archaeology and Geological Testing**

We also wish to confirm that a significant amount of work has been undertaken on the Project and it is our opinion, subject to some future agreement, that this work will need to be re-done to ensure that honour of the Crown is upheld.

We also confirm our review of Ontario's Archaeology Standards and Guidelines and confirmed that the Guidelines have, to date, not been followed.

We also raised concerns with the manner in which archaeology is proceeding and how it does not meet with the required level of diligence which the Haudenosaunee require to ensure that our commitments to our obligations are maintained. As we indicated these obligations are over and above those set out in the Guidelines. You have advised that you will advise if you are prepared to amend the process going forward to honour our modest request.

In particular there appears to an issue with 'plowing' in relation the archaeology. We acknowledge that you confirmed that plowing is best practices but that to date you are not plowing throughout the entirety of the proposed Project. We confirm that you will be providing us with a map setting out the areas that have been plowed versus the area that has not been plowed.

We would ask that you please provide the contact information for your Consultant Archaeologist so that we can follow-up with that person directly as they have specific regulatory and professional obligations vis a vis engagement.

### **Current Line**

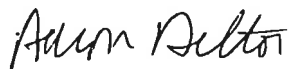
You advised that you intend to leave the current line in the ground and we advised that this a very serious impairment of our environmental/spiritual obligations to what we refer to as our mother the earth. You advised that the Technical Standards and Safety Authority (TSSA) is responsible for approval in relation to the current line and will be responsible for any approvals in relation to the established line. We would ask that you immediately notify the TSSA of our objections so that we may begin the engagement process with TSSA. At the same time this correspondence is copied to the TSSA and we are providing same as a notification for a request for engagement with the TSSA.

We confirm that we had many additional questions and concerns in relation to the Project but that time constraints required you and your team to leave the meeting.

We look forward to hearing from you and we are proposing meeting on Tuesday November 13, 2018 at which time we anticipate having received and reviewed your application.

Again, it was a pleasure meeting with you and HDI looks forward to a relationship with Imperial that is based on mutual respect for our respective rights and interests.

Respectfully,



R. Aaron Detlor