

June 1, 2022

Delivered By Email & RESS

Ms. Marconi, Acting Registrar
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Marconi,

**Re: Ontario Energy Board File No. EB-2022-0012
Strictly Confidential – Responses to Written Interrogatories**

We are counsel to the Haudenosaunee Development Institute (“**HDI**”), intervenor in the above-noted proceeding. Pursuant to the Ontario Energy Board’s (“**OEB**”) Procedural Order No. 4 dated April 29, 2022, please find enclosed HDI’s responses to written interrogatories.

Confidentiality Request

Responses to interrogatories 3-SCPL-1 (b)-(f) contain confidential information that would meet the OEB’s test for confidential treatment under the OEB’s Practice Direction on Confidential Filings, due to the potential harm that could result from the disclosure of such information. For example, questions relating to HDI’s draft engagement agreement may interfere with negotiations and have therefore been redacted pursuant to Rule 10.01 of the OEB’s Rules of Practice and Procedure.

In keeping with the requirements of the Practice Direction, a combined confidential unredacted version of responses to interrogatories 3-SCPL-1 (b)-(f) is filed with the Registrar only. The confidential version of responses to interrogatories 3-SCPL-1 (b)-(f) is marked “Confidential” with highlighting to identify the confidential information. In accordance with Section 5.1.4 of the Practice Direction, HDI is providing Table 1 below which sets out each piece of redacted information: (i) the specific page(s) that contain the confidential information; and (ii) the basis for the confidential information claim.

	Page	Basis for confidential information claim
1.	8-9	Responses to interrogatories 3-SCPL-1 (b)-(f) contain information related to HDI’s draft engagement agreement

HDI requests that the redacted information be kept confidential. HDI confirms that the responses attached do not include any personal information as defined in the *Freedom of Information and Protection of Privacy Act, 1990*.

If you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

GILBERT'S LLP

A handwritten signature in blue ink, appearing to be 'TG' with a flourish extending to the right.

Tim Gilbert

EB-2022-0012

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; and
in particular sections 90(1), 96(1), and 97 thereof

AND IN THE MATTER OF an application by Sun-Canadian Pipe Line Limited to construct
the NPS 12 East Sixteen Mile Creek Pipeline Replacement Project in the Town of Milton,
Ontario

RESPONSES TO WRITTEN INTERROGATORIES

(Filed June 1, 2022)

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Responses to Interrogatories from OEB Staff

STAFF-1

Questions:

1. Please provide a copy of the draft Engagement Agreement. If a copy cannot be provided (for example if the agreement is confidential in some respect), please explain.
2. Please indicate specifically what other assessments HDI expects will be required for the Project.
3. Please comment on HDI's view of the adequacy of the assessments provided in the Environmental Report (cumulative effects assessment, environmental assessment, archaeological assessment) filed with SCPL's application.
4. Has HDI had any discussions with SCPL regarding the assessments and the proposed mitigation measures outlined in the Environmental Report? If so, please comment on HDI's perspective regarding these discussions.
5. Is it HDI's position that it will oppose the Project unless an Engagement Agreement is concluded?

Responses:

1. See **Appendix "A"** to SCPL's Strictly Confidential Interrogatories (CONFIDENTIAL – SCPL – IR_EVD_HDI_20220520).
2. See Affidavit of Aaron Detlor, affirmed May 13, 2022 ("**Detlor Affidavit**"), paras 19-20. Although it is not possible to ascertain what other assessments will be required for the Project in the absence of a comprehensive engagement agreement between HDI and SCPL, HDI expects that, among other things, a cumulative impact assessment, environmental assessment, and cultural resource assessment will be required.
3. See Detlor Affidavit, paras 19-20, 43-47. Given the high cost and expenditure of resources required, HDI is not in a position to effectively provide a view of the adequacy of the assessments provided in the Environmental Report filed with SCPL's application.
4. HDI has not had any discussions with SCPL regarding the assessments and the proposed mitigation measures outlined in the Environmental Report. Such discussions are not possible given SCPL's refusal to execute an engagement agreement with HDI, particularly where sacred and spiritual interests that require the utmost assurances of confidentiality are at stake.
5. Yes. HDI cannot provide its consent if SCPL is not even willing to discuss an engagement agreement.

STAFF-2

Question:

1. Please provide details on how the Project that is before the OEB in this proceeding will impact Haudenosaunee constitutionally protected rights and interests, including details regarding any potential impacts of the Project on Aboriginal or treaty rights.

Response:

1. An assessment of the impacts of the Project on Haudenosaunee constitutionally protected rights and interests, including potential impacts on Aboriginal or treaty rights, requires a significant expenditure of resources. An engagement agreement executed between HDI and a proponent ensures HDI receives appropriate compensation for the resources necessary to conduct such an assessment. Given SCPL's refusal to discuss or execute an engagement agreement, HDI has not conducted an assessment of the impacts of the Project and is therefore not in a position to provide the requested details. See Detlor Affidavit, paras 43-47.

STAFF-3

Question:

1. The Environmental Report refers to the potential for impacts to harvesting and hunting, or to disturb culturally significant artifacts. It also notes that such impacts are not known to occur, only that there is a potential for them to occur. Is HDI aware of any specific potential impacts that the Project that is before the OEB in this proceeding will have on Haudenosaunee harvesting and/or hunting and/or fishing rights, or any other Aboriginal or treaty rights? Please provide any relevant details.

Response:

1. See response to STAFF-2. Also see Detlor Affidavit, paras 43-47.

STAFF-4

Question:

1. Is Mr. Hill aware of any specific impacts that the Project that is before the OEB in this proceeding may have on the Haudenosaunee's Aboriginal or treaty rights?

Response:

1. No. Mr. Hill's mandate was strictly limited to providing the historical context of the Nanfan Treaty of 1701 and explaining its basic terms and scope, both as written and as understood by the Haudenosaunee.

STAFF-5

Question:

1. Is Mr. Hollis aware of any specific impacts that the Project that is before the OEB in this proceeding may have on the Haudenosaunee's Aboriginal or treaty rights?

Response:

1. No. Mr. Hollis' mandate was strictly limited to reviewing the Nanfan Treaty of 1701 and providing his opinion on the following questions from an economic perspective:
 - a. How do you interpret the nature of the rights granted to the Haudenosaunee by the Nanfan in the treaty territory, based on its text and your understanding of the surrounding circumstances in 1701?

- b. What are the economic implications, if any, of those rights today?
- c. How is your understanding of those rights and implications affected, if at all, by any characterizations of Nanfan in the decisions you were provided?

STAFF-6

Question:

- a) What provisions of the 1701 Nanfan Treaty support this statement? Is it the provisions cited at para. 17?

Response:

1. The entirety of the text of the Nanfan Treaty of 1701 supports this statement.

Responses to Interrogatories from SCPL

1-SCPL-1

Questions:

- a) Please describe how Haudenosaunee Confederacy Chiefs Council (“HCCC”) delegated its authority to engage on development issues in Haudenosaunee treaty territory to HDI.
- b) For (a), what instrument did HCCC use to delegate authority to HDI and kindly provide a copy.
- c) For (a) and (b), please list any limitations or restrictions on this delegated authority.
- d) Does the authority delegated from HCCC to HDI expire? If so, please provide the date.
- e) How does HDI update or review the authority delegated from HCCC to HDI? When was this last completed?
- f) Please provide copies of all records evidencing (c), (d) and (e).
- g) What governance obligations, responsibilities, liabilities, if any, flow with this delegated authority?
- h) What are the mechanisms for obtaining approval(s) and authorization from the HCCC when HDI is negotiating engagement agreements on its behalf?

Responses:

a)

The HCCC are empowered by Haudenosaunee Law to make decisions and resolutions concerning the treaty rights and interests of the Haudenosaunee—resolutions made at Grand Council form part of Haudenosaunee Law. The HCCC can also delegate its authority to negotiate matters concerning Haudenosaunee treaty and land rights and interests to other entities for specific purposes or mandates. The HCCC, however, ultimately approves all final agreements.

The HCCC is comprised of three “benches”: the “Elder Brothers” (comprised of the Mohawk and Seneca Peoples), the “Younger Brothers” (comprised of the Oneida and Cayuga Peoples—the Tuscarora and other Nations speak through the Cayuga People), and the “Fire Keepers” (the Onondaga People). Each Grand Council meeting must have representation from a minimum of three of the Five Nations for quorum.

The Onondaga formally open and close all HCCC meetings. The Onondaga first propose an issue for discussion. Before an issue is debated, the HCCC must unanimously agree to discuss it. Issues are addressed by each bench sequentially before passing to the next. A decision of the HCCC is rendered on the unanimous agreement of all three “benches”. A decision or resolution is maintained in the record of the Grand Council.

Since time immemorial, Chiefs of the Haudenosaunee Confederacy have delegated ambassadors to negotiate treaties on their behalf, or for other specific purposes. The Chiefs could appoint any individual or entity to perform a delegated function—there was nothing specific under Haudenosaunee Law specifying who or what groups may be delegated. The delegation is at the collective discretion of the Chiefs and decided upon in the same manner

as decisions and resolutions. In other words, the Chiefs reach one mind to a consensus regarding the delegation of authority.

Since at least the 1900s, HCCC has delegated authority to various committees and agencies to work on behalf of the Haudenosaunee for various purposes.

HDI is but one of the entities delegated authority for a specific purpose by the HCCC. HDI was established in 2007 pursuant to a delegation of authority from the HCCC, consistent with Haudenosaunee Law and governance as described above. This delegation to HDI from HCCC constitutes standing authority for HDI to represent Haudenosaunee interests in respect of development on Haudenosaunee lands in Ontario.

- b) Delegation of HDI was made pursuant to Haudenosaunee Law and no specific instrument. The delegation is recorded in the minutes of HCCC council, which are held at Ohsweken and only available in person by request.
- c) Where a project is recommended for approval by HDI, final approval must be provided by the HCCC and its processes.
- d) No.
- e) How HDI updates or reviews the authority delegated from HCCC to HDI is not relevant to any issue in this matter. The relevant fact is that HDI is currently delegated the authority to advance Haudenosaunee rights and interests in respect of development on Haudenosaunee lands. Should such authority be removed, HDI will inform the necessary parties.
- f) See (b).
- g) HDI's responsibilities entail advancing and representing the rights and interests of the Haudenosaunee in respect of development on Haudenosaunee lands.
- h) Recommendations for approval are brought before the HCCC in the same manner as described in (a).

2-SCPL-1

Questions:

- a) Please list all correspondence prepared by HDI and addressed to SCPL regarding communications on the "HDI application for consideration and engagement for development".
- b) Please list all correspondence prepared by HDI and addressed to SCPL informing SCPL that it was not carrying out engagement with HDI or the HCCC.
- c) At what points in time did the HDI inform SCPL that it was not fully engaging with HDI?

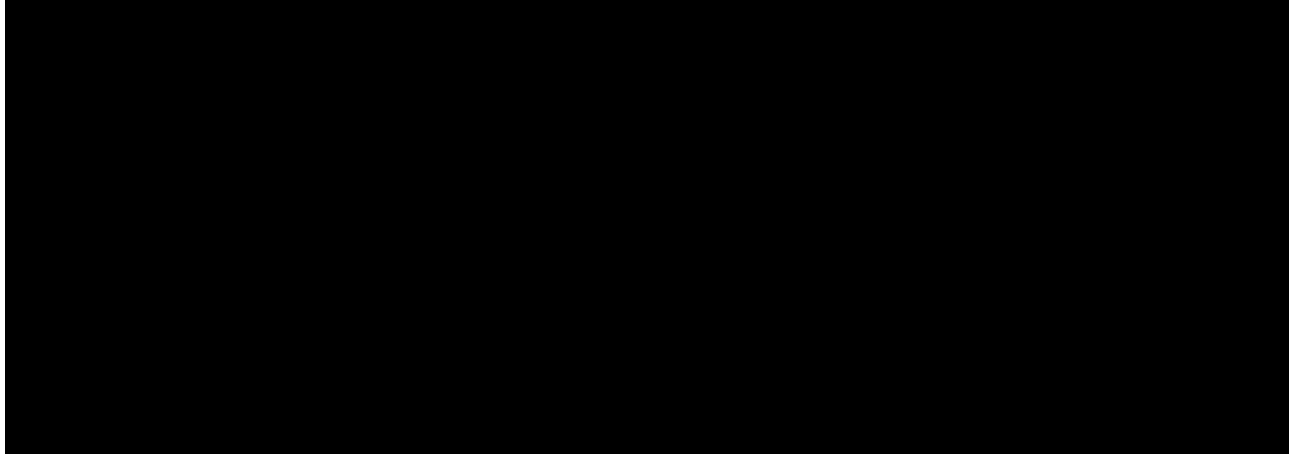
Responses:

- a) See Appendix STAFF-9-1 Indigenous Consultation Timeline 20220426 for a list of correspondence between HDI and SCPL.
- b) This correspondence does not exist. Whether HDI explicitly informed SCPL that it was not carrying out engagement with HDI or the HCCC is irrelevant.
- c) March 7, 2022. See HDI_IntrvREQ_20220307.

3-SCPL-1

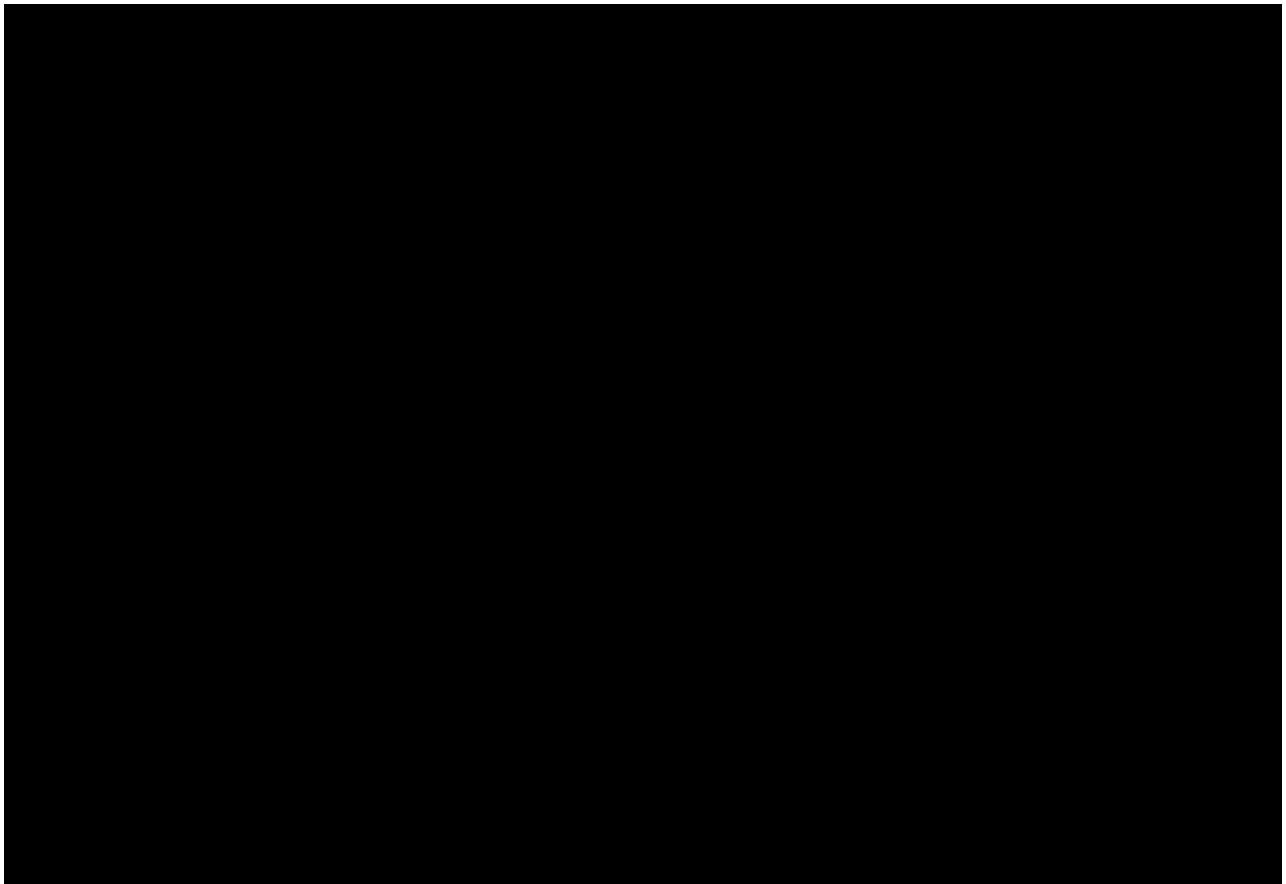
Questions:

- a) Please confirm that attached at Reference (2) is a copy of the form of Engagement Agreement submitted by HDI to SCPL on April 6, 2022.



Responses:

- a) Confirmed.





4-SCPL-1

Questions:

- a) Please confirm that HDI's request for eligibility for cost awards was not contested by SCPL and was accepted by the Ontario Energy Board in Procedural Order No. 1.
- b) Please confirm that HDI intends to seek a cost award to financially support its participation in this Application, and that HDI is eligible for recovery of costs associated with both legal counsel and third party consultants in accordance with the OEB's tariff.
- c) Please explain why HDI has chosen not to file evidence on the impacts of EB-2022- 0012 on Haudenosaunee rights and interests, in light of the funding set out in Procedural Order #1 (which was not contested by SCPL).

Responses:

- a) Confirmed.
- b) Confirmed. HDI will note that the OEB has made it explicitly clear that being eligible to apply for recovery of costs is not a guarantee of any costs claimed. HDI's meaningful participation in the Application, which includes, but is not limited to, conducting environmental assessments, cumulative impact assessments, and cultural resource assessments, requires a significant expenditure of resources. Without a legally binding instrument guaranteeing compensation for HDI's involvement, and the associated risk of not receiving compensation for same, HDI's invitation to participate is a disingenuous offer that does not constitute meaningful engagement. Also see the Detlor Affidavit, paras 42-47.
- c) See (b), above. Also see Detlor Affidavit, paras 42-47.

5-SCPL-1

Question:

- a) Given HDI's stated experience in project development and receiving dozens of applications a month, please explain why HDI has not identified, at least at a high level, its specific concerns about the impact of replacing 480 metres of an existing pipeline, in discussions with the applicant.

Response:

- a) See response to STAFF-2. See Detlor Affidavit, paras 42-47.

6-SCPL-1

Question:

- a) Please confirm that SCPL has retained HDI, or members of the Haudenosaunee, in environmental monitoring and archaeological monitoring activities, whether through

Environmental Monitoring Agreements, Archaeological Monitoring Agreements or otherwise, on an annual basis since 2017.

Response:

- a) To the extent HDI or members of the Haudenosaunee have been retained by SCPL on an annual basis since 2017 in respect of projects other than the current project, this is not relevant as it does not concern the current project. HDI and SCPL have entered into Environmental Monitoring and Archaeological Agreements in respect of the current project, however, these alone do not satisfy HDI's engagement process or constitute meaningful engagement. See Detlor Affidavit, paras 29-31.

7-SCPL-1

Questions:

- a) Does HDI agree that the project is urgent? Yes or no?
- b) If the answer to (a) is no, please discuss the reasons why and include a discussion about managing environmental risks.

Responses:

- a) HDI's preliminary view is that the project is not urgent.
- b) As discussed, the absence of an engagement agreement precludes HDI's ability to comprehensively assess whether the project is urgent. However, given that SCPL made no indication in its application materials that the project is "urgent", and that the issue of urgency was not raised in the March 29, 2022 meeting between HDI and SCPL, it is HDI's preliminary view that the project is not urgent.

8-SCPL-1

Questions:

- a) Is Mr. Hollis, or his client or counsel, asking the OEB to qualify Mr. Hollis as an expert witness in this proceeding? If so, in which specific areas or topics does Mr. Hollis claim to be an expert?
- b) Please provide Mr. Hollis' specific qualifications, education and experience that directly pertain to all those areas or subject matters to which he claims to be an expert.
- c) Please provide examples whether Mr. Hollis has been qualified as an expert witness on the matters and subject areas in (b) by a court of law and/or an administrative tribunal. Please include the date and year of the proceeding and the name of the adjudicating body.
- d) Please provide specific examples of where Mr. Hollis has previously dealt with similar matter(s) discussed in his affidavit.

Responses:

- a) Yes. Counsel for HDI is asking that the OEB qualify Mr. Hollis as an expert in the area of economics, industrial organization, and damages quantification.
- b) See curriculum vitae of Aidan Hollis, attached to his affidavit as Exhibit "A".

c)

- Eli Lilly Canada Inc. v. Teva Canada Ltd., 2017 FC 88 (Federal Court)
- Teva Canada Ltd. v. Pfizer Canada Inc., 2017 FC 332 (Federal Court)
- Eli Lilly and Co. v. Apotex Inc., 2014 FC 1254 (Federal Court)
- Apotex Inc. v. Sanofi-Aventis, 2012 FC 553 (Federal Court)
- Allergan Inc. v. Canada (Minister of Health), 2012 FC 767 (Federal Court)
- Laboratoires Servier v. Apotex Inc., 2008 FC 825 (Federal Court)
- Apotex Inc. v. Merck & Co., 2008 FC 1185 (Federal Court)
- Sanofi-Aventis Canada Inc. v. Canada (Minister of Health), 2006 FC 1559 (Federal Court)

d) See response to (c).