June 15, 2022

Delivered By Email & RESS

Ms. Marconi, 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
Submissions of the Haudenosaunee Development Institute

Pursuant to the Ontario Energy Board's Procedural Order No. 4 dated April 29, 2022, please find enclosed HDI's submissions in the above-captioned matter.

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

Yours very truly,

GILBERT'S LLP

Tim Gilbert

GILBERT'S LLP
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

T: 416.703.1100
F: 416.703.7422
www.gilbertslaw.ca

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

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SUBMISSIONS OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE

GILBERT'S LLP
Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Tim Gilbert

Tel: 416.703.1100
Fax: 416.703.7422

Lawyers for the Haudenosaunee Development Institute

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OVERVIEW

1. The Ontario Energy Board should deny SCPL's request for leave to commence construction on the Project as described in its Leave to Construct Application. ***First***, the Crown and the proponent have failed to obtain the consent of the Haudenosaunee as required by the United Nations Declaration on the Rights of Indigenous Peoples. ***Second***, the Crown and the proponent have failed to meaningfully engage with the Haudenosaunee with respect to the Project. Without more, the Board should deny the Leave to Construct Application.

2. Prior to June 21, 2021, the Board was not bound by UNDRIP. Since that time, with the coming into force of Canada's *UNDRIP Act* and affirmation of the Declaration's application in Canadian law, the Board must ensure that the Haudenosaunee have given their free, prior and informed consent prior to granting SCPL's Leave to Construct Application.

3. Given the Crown's failure to meaningfully engage with HDI in respect of the Project, this consent has not been provided. The Haudenosaunee cannot provide their consent when the Crown, among other things, fails 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.

4. An engagement process that fails to uphold the honour of the Crown cannot constitute meaningful engagement. In this case, the Crown's (including the Board's and the Minister's) failure to conduct a preliminary assessment and lay the groundwork for meaningful engagement precludes the possibility of meaningful engagement of the Haudenosaunee in respect of the Project.

5. Even if the Board believes that it is somehow not bound by UNDRIP, the result is the same: without meaningful engagement, the Leave to Construct Application cannot be granted.

6. The Crown may attempt to justify its failure to engage, and absolve itself of its obligations, by pointing to SCPL's "efforts" to engage with HDI. But the duty ultimately lies with the Crown. If the Board finds that SCPL's efforts, predominantly consisting of Monitoring Agreements that do not amount to engagement unless and until the Board grants leave for construction to begin, and a refusal to negotiate an engagement agreement, then the bar for engagement is lower than the Courts have repeatedly set forth, and much lower than what HDI submits is necessary to advance the goals of reconciliation. To the contrary, the Crown's and SCPL's failure to engage with the Haudenosaunee in respect of the Leave to Construct Application are on par with conduct the courts have described as being *corrosive* to the goals of reconciliation.

7. HDI's concerns with the Crown's failure to engage are not trivial; granting the Leave to Construct Application will have real and lasting impacts on the treaty rights of the Haudenosaunee, particularly the Haudenosaunee's procedural rights as they relate to development projects. Granting the Leave to Construct Application without the Haudenosaunee's consent may set a dangerous precedent, emboldening proponents—and the Crown—to disregard the requirement(s) to meaningfully engage and obtain the required consent set out in UNDRIP.

8. Absent further Crown engagement and the provision of Haudenosaunee consent, the Board cannot grant the Leave to Construct Application.

BACKGROUND

A. HAUDENOSAUNEE CONFEDERACY AND THE HAUDENOSAUNEE CONFEDERACY CHIEFS COUNCIL

9. The Haudenosaunee Confederacy refers to a cultural union of Indigenous Nations that formed a representative government centuries prior to European contact in North America. The Haudenosaunee Confederacy is comprised of, among others, the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Peoples.[1] References to the "Haudenosaunee" refer to citizens of the Haudenosaunee Confederacy.

10. The Haudenosaunee Confederacy Chiefs Council (the "**HCCC**") is the council of chiefs of the Haudenosaunee Confederacy that have been continuously holding Council at Ohsweken, Ontario for over 230 years. The HCCC is empowered by the Haudenosaunee to advance the collective treaty rights and interests of the Haudenosaunee.[2]

B. THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE AND ITS PROCESSES

11. The Haudenosaunee Development Institute ("**HDI**") was established in 2007 and acts pursuant to delegated authority from the HCCC to administer and facilitate engagement with the HCCC in respect of Haudenosaunee lands.[3]

12. The process for proponents of development, including developers and governments, to engage with the HCCC is an open and well-known one.[4] Applications are reviewed by HDI on

[1] Affidavit of Aaron Detlor (affirmed May 13, 2022) at para 6 ["**Detlor Affidavit**"].

[2] Detlor Affidavit at para 8.

[3] Detlor Affidavit at paras 1, 9, and 11.

[4] Detlor Affidavit at para 16.

behalf of the HCCC with a view to facilitating and advancing the goals of reconciliation consistent with the treaty-based relationship between the Crown and the Haudenosaunee.[5]

13. Engagement is a formal process commenced by application to HDI. The scope of engagement required is ascertained in the execution of a comprehensive engagement agreement between a project proponent and HDI.[6] Upon satisfaction that Haudenosaunee principles, rights, and interests have been properly addressed in the implementation of the project at issue, HDI's engagement process concludes with the granting of consent by the HCCC, which may include conditions such as compensation for infringement of rights or Haudenosaunee employment opportunities.[7]

C. THE HAUDENOSAUNEE INTEREST IN THE PROJECT

14. Sun-Canadian Pipeline Limited ("**SCPL**") seeks to replace an approximately 480 metre portion of pipeline at East Sixteen Mile Creek in the Town of Milton (the "**Project**"). On January 17, 2022, SCPL filed an application with the Ontario Energy Board (the "**Board**"), seeking leave to commence construction on the Project (the "**Leave to Construct Application**" or "**Application**").

15. The site of the Project is situated on territory subject to the 1701 Treaty, under which the Crown pledged to protect the right of the Haudenosaunee to free and undisturbed use and occupation of the subject lands.[8] While the 1701 Treaty explicitly refers to "hunting", the Haudenosaunee perspective is that "hunting" applies to resource management and regulation more

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[5] Detlor Affidavit at para 17.

[6] Detlor Affidavit at paras 19-20.

[7] Detlor Affidavit at para 21.

[8] Affidavit of Richard Wayne Hill, Sr. (affirmed May 12, 2022) at paras 18 and 28 ["**Hill Affidavit**"].

generally. In particular, the scope of the land under the 1701 Treaty required the establishment of numerous autonomous encampments and settlements, which were supported by hunting, fishing, horticulture, and other activities.[9]

16. Extensive development and the privatization of lands within the 1701 Treaty territory has led to a degradation of the natural environment and historical damages to the Haudenosaunee. An illustration of the potential scale of losses by using average income of persons engaged in "fishing, hunting, and trapping" in Canada results in a calculation of $570 million in losses per annum by the Haudenosaunee."[10]

D. DELEGATION OF DUTY TO SCPL

17. On July 28, 2020, the Ministry of Energy, Northern Development and Mines (the "**Ministry**" or "**Minister**"), on behalf of the Government of Ontario, wrote to SCPL regarding its Leave to Construct Application (the "**Delegation Letter**").[11]

18. In the Delegation Letter, the Ministry reviewed information provided by SCPL pertaining to the Leave to Construct Application and identified the HCCC as a necessary party to engage with. The Crown also required that HDI be copied on all correspondence with the HCCC.

19. In the Delegation Letter, the Ministry formally delegated procedural aspects of its duty in respect of the Leave to Construct Application to SCPL. The Crown noted that it would "fulfill the

[9] Hill Affidavit at para 22.

[10] Hollis Affidavit at para 36.

[11] Detlor Affidavit at para 23; see also Detlor Affidavit at Exhibit "D".

substantive aspects of consultation and retain oversight over all aspects of the process for fulfilling the Crown's duty."[12]

SUBMISSIONS

20. Granting leave to SPCL to carry out construction as described in its Leave to Construct Application would have the direct impact of eroding the Haudenosaunee's treaty rights, which are comprised of *procedural* rights (*e.g.*, engagement with the Haudenosaunee and the provision of free, prior, and informed consent) and *substantive* rights (*e.g.*, hunting, fishing, trapping, and harvesting rights).[13]

21. The Crown has not complied with its procedural obligations to the Haudenosaunee. As discussed below, the Haudenosaunee have not provided their free, prior, and informed consent for the Leave to Construct Application. Nor have the Crown or SCPL asked for this consent. Further, both the Crown and SCPL have failed to meaningfully engage with the Haudenosaunee regarding the Leave to Construct Application.

22. If SCPL is granted leave without the consent of or any meaningful engagement with the Haudenosaunee (on a project that may impact the Haudenosaunee and their treaty lands), it sets a dangerous precedent. Future proponents will be more likely to engage in the same surface-level discussions with the Haudenosaunee, telling the Crown or Crown agencies that they have made efforts, but couldn't see eye-to-eye, and having their projects approved without any further process or meaningful engagement with the Haudenosaunee.

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[12] Detlor Affidavit at Exhibit "D".

[13] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 57 [***Mikisew***].

23. To be clear, the following submissions relate to the impact of the Leave to Construct Application on the procedural rights of the Haudenosaunee, which are separate and distinct from the *substantive* rights arising from the 1701 Treaty. As discussed below, a comprehensive assessment of the impact of the Leave to Construct Application on the Haudenosaunee's substantive treaty rights has not been conducted due to, in part, the Board's and SCPL's unreasonable insistence that the Haudenosaunee shoulder the costs of engagement.

A. THE CROWN HAS FAILED TO OBTAIN THE FREE, PRIOR, AND INFORMED CONSENT OF THE HAUDENOSAUNEE IN RESPECT OF THE PROJECT

24. In accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**"), the Board cannot grant SCPL's Leave to Construct Application absent the free, prior, and informed consent of the Haudenosaunee.

25. The *UNDRIP Act*[14] came into force June 21, 2021 and, along with affirming UNDRIP's application, requires that the Crown take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP.[15] Reference herein to "**UNDRIP**" includes reference to the Declaration as adopted by resolution 61/205 of the General Assembly and the Schedule to the *UNDRIP Act*.

26. Article 32(2) of UNDRIP affirms that the Crown must consult and cooperate in good faith with the Haudenosaunee through their own representative institutions to obtain their free, prior, and informed consent prior to the approval of any project affecting Haudenosaunee treaty lands.[16]

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[14] SC, 2021 c 14 ["***UNDRIP Act***"].

[15] *UNDRIP Act* s 5.

[16] *UNDRIP Act* Schedule, Art. 32(2).

27. As recognized in SCPL's application materials, the Project may affect Haudenosaunee rights and their treaty lands.[17] The Crown must therefore consult and cooperate with the Haudenosaunee to obtain the Haudenosaunee's consent prior to approval.

28. The Board, exercising executive power authorized by the *Ontario Energy Board Act*, is the vehicle through which the Crown acts—a decision of the Board therefore constitutes Crown action.[18] As such, the Board is bound by UNDRIP and must take all measures necessary to ensure that the laws of Canada are consistent with the articles enumerated in UNDRIP. The Project, therefore, cannot proceed unless and until the Crown (or the Board) obtains the free, prior, and informed consent of the Haudenosaunee.

29. Given the lack of meaningful engagement by the Crown (discussed below), the Haudenosaunee cannot provide their consent to the Project. If the Board approves the Leave to Construct Application, it will be doing so contrary to the provisions of UNDRIP.

30. The concept of obtaining the consent of Indigenous peoples did not originate with UNDRIP. In 2014, the Supreme Court of Canada held that once Aboriginal title is established, subsection 35(1) of the *Constitution Act, 1982*[19] permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty.[20] The Courts have also held that treaty rights,

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[17] See *e.g.*, Stantec, "Environmental Report" (December 21, 2021) at s 4.4.10 "Indigenous Interests", p 56.

[18] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 29 [***Clyde River***].

[19] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 s 35.

[20] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 2 [***Tsilhqot'in***].

like the Haudenosaunee rights at issue in respect of the Project, are akin to Aboriginal rights stemming from Aboriginal title.[21]

31. The onus is on the Crown to justify infringement of Haudenosaunee rights on the basis of a compelling and substantial purpose and to establish that incursions are consistent with the Crown's fiduciary duty.[22] The Crown has never provided the Haudenosaunee with such a justification. As a result, and absent the Haudenosaunee's free, prior, and informed consent, the Board cannot approve SCPL's Leave to Construct Application.

B. THE CROWN HAS NOT MEANINGFULLY ENGAGED WITH THE HAUDENOSAUNEE IN RESPECT OF THE PROJECT

32. The duty to meaningfully engage with Indigenous groups lies with the Crown. The Minister, under the pretense of consultation, delegated procedural aspects of its duty to SCPL. SCPL's attempts to engage with the Haudenosaunee, and the Crown's inaction (including that of the Minister and the Board) do not constitute meaningful engagement in respect of the Project. As a result of the Crown's failure to fulfill its engagement obligations, the Board cannot make an order granting leave to SCPL.

1. Duty to engage ultimately lies with the Crown

33. The duty to engage with the Haudenosaunee is grounded in the treaty relationship between the Crown and the Haudenosaunee, recognized and affirmed in subsection 35(1) of the *Constitution Act, 1982*.[23] The Haudenosaunee legal framework, which long predates the arrival of the Canadian common law in North America, recognizes and affirms the treaty-based relationship

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[21] *Tsilhqot'in* at para 132; *R v Badger*, [1996] 1 SCR 771 (SCC) at para 82.

[22] *Tsilhqot'in* at paras 18 and 77; *R v Sparrow* (1990), 1 SCR 1075 (SCC) at paras 59 and 62.

[23] See *e.g.*, *Tsilhqot'in* at paras 78 *et seq*.

by way of the Haudenosaunee constitution—referred to in Mohawk as *Kaianere'ko:wa* (or the Great Law of Peace).

34. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development. However, the ultimate legal responsibility for engagement rests with the Crown; the honour of the Crown cannot be delegated.[24] The duty of Crown engagement and honourable dealing with the Haudenosaunee is a doctrine that applies independently of the explicit or implicit intention of the parties.[25]

35. SCPL was entitled to fulfill the procedural aspects of engagement that it was delegated by the Minister (or not). However, one consequence of SPCL's failure to engage is the potential denial of the Leave to Construct Application, or further delay for the Crown to meaningfully engage with the Haudenosaunee.[26]

36. Ultimately, the Board must assess whether the duty has been discharged by the Crown, not by SCPL.[27] Where the regulatory process or delegate of the Crown fails to achieve meaningful engagement, the Crown must take further measures to discharge its duty, which may include filling any gaps on a case-by-case basis, making submissions to the regulatory agency, requesting reconsideration of a decision, or seeking a postponement in order to carry out further engagement in a separate process before the decision is rendered, all of which are options available to the Crown in respect of the Leave to Construct Application.[28]

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[24] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53 [***Haida***].

[25] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 61.

[26] *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 8 (Ont Div Ct) [***Saugeen***].

[27] *Saugeen* at para 19; *Clyde River* at para 28.

[28] *Clyde River* at para 22.

37. The Board must consider the sufficiency of the Crown's engagement with the Haudenosaunee as it relates to the Project and consider the question: what has the Crown done to engage with the Haudenosaunee in respect of the Project?

2. Past failures to engage inform the present duty to engage

38. The Crown's duty to engage does not exist in a historical vacuum and does not come to an end once a project is approved.[29] In particular, the Crown is required to "be responsive to outstanding or fresh First Nation concerns throughout the life of a project."[30]

39. Moreover, it may be impossible to understand the seriousness of the impact of a project on subsection 35(1) rights without considering the larger context.[31] In this case, that means the Board must assess the Crown's fulfillment of its ongoing duty in respect of the Project in the context of SCPL's pipeline as a whole.

40. HDI understands that the duty to engage does not include remedying historic wrongs. But engagement must include a concerted effort by the Crown to not frustrate the Haudenosaunee's reasonable efforts to remedy the consequences of past actions or inactions.[32]

41. The Crown has never meaningfully engaged the Haudenosaunee in respect of the pipeline that is the subject of SCPL's Leave to Construct Application, despite the pipeline operating on and

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[29] *Saugeen* at para 29; *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89 at para 59 [***Bigstone***], citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 45.

[30] *Bigstone* at para 59.

[31] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 42 [***Chippewas***].

[32] *Saugeen* at para 29.

within Nanfan Treaty Lands.[33] The consequences of that failure are that the Haudenosaunee have never been given an opportunity to assess the impacts of SCPL's pipeline on their treaty rights.[34]

42. The Leave to Construct Application provides the Haudenosaunee an opportunity to assess the impacts of a small segment of the pipeline—namely, 480 metres in the vicinity of the East Sixteen Mile Creek crossing—on Haudenosaunee rights. 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.

43. The Crown should endeavour to not only promote engagement in respect of the Project, but also avoid frustrating HDI's efforts to review and assess the pipeline as it relates to the Project.

44. In Procedural Order No. 3, the Board cautioned that evidence (and, implicitly, submissions) that do not directly relate to the impacts of the Project on treaty rights may warrant a denial of costs by the Board. Respectfully, this caution fails to appreciate the historical context of the Project, including the Crown's engagement with the Haudenosaunee (or failure to engage) with respect to SCPL's pipeline and the fact that UNDRIP did not have application in Canadian law until June 2021.

45. The Board's narrowing of the issues HDI may address in these submissions does not demonstrate a good faith effort on the part of the Board to fulfill the Crown's ongoing engagement obligations, which include addressing HDI's concerns.[35]

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[33] Detlor Affidavit at para 50.

[34] Detlor Affidavit at para 50.

[35] *Mikisew* at paras 54-55, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) at para 168.

46. By narrowing the scope of HDI's submissions, the Board frustrates HDI's efforts to remedy the consequences of the Crown's failure to ever engage with the Haudenosaunee in respect of SCPL's pipeline.

3. The Crown has neither conducted nor provided to the Haudenosaunee preliminary assessments of the duty to engage in respect of the Project

47. The obligation to conduct and disclose a preliminary assessment of the strength of the case supporting the existence of the right(s), and to provide an assessment of the scope of the duty to engage based in part on that preliminary assessment, are discrete requirements of constitutional stature. These assessments are often referred to together in the engagement context as a "preliminary assessment", "initial assessment", or "*prima facie* assessment".[36]

48. The content and scope of the Crown's duty to engage is informed by the Crown's assessment of the strength of the asserted right and the "seriousness of the potentially adverse effect upon the right or title claimed."[37] Thus, conducting and disclosing the results of any preliminary assessment are early steps in the Crown's fulfilment of its engagement obligations that necessarily precede any supervision of the consultation process delegated to a proponent.

49. At a minimum, the Crown is required to provide the affected group (*i.e.*, the Haudenosaunee) with a preliminary assessment, together with supporting documentation explaining its conclusions.[38]

50. The Ontario Energy Board's "Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario" (the "**Environmental Guidelines**") acknowledge that "preliminary and

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[36] *Saugeen* at para 54, citing *Haida*.

[37] *Long Plain* at para 102, citing *Haida*.

[38] *Saugeen* at para 54.

ongoing assessment of potential adverse effects on rights" is a "substantive aspect" of the duty to engage, meaning it cannot be delegated to the SCPL or otherwise.[39] The Delegation Letter further provides that "the Crown's role in fulfilling any duty to consult and accommodate in relation to this Project includes […] carrying out, from time to time, any necessary assessment of the extent of consultation or, where appropriate, accommodation, required for the project to proceed."[40]

51. Despite these assurances, the Haudenosaunee have never been provided a preliminary assessment in respect of the Project or any supporting documentation prepared or relied upon by the Crown (or otherwise).

52. To the contrary, the Board refused HDI's formal request for the Board's preliminary assessment of Haudenosaunee rights and interests in respect of the Project in their written interrogatories.[41] This refusal is antithetical to engagement, particularly given the claim in the Delegation Letter that the Minister had "assessed [the Project] against the Crown's current understanding of the interests and rights of Aboriginal communities who hold or claim Aboriginal or treaty rights protected under Section 35 of Canada's Constitution Act 1982 (Indigenous Communities) in the area. In doing so, [the Minister] has determined that the Project may have the potential to affect such Indigenous communities."[42]

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[39] Ontario Energy Board, "Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario" (7th ed., 2016) at 16, accessible online: https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2019-01/Enviromental-Guidelines-HydrocarbonPipelines-20160811.pdf, Detlor Affidavit, Exhibit "H" ["**Environmental Guidelines**"].

[40] Letter from Ministry of Energy, Northern Development and Mines to Sun-Canadian Pipe Line (July 28, 2020) at 7, Detlor Affidavit, Exhibit "D" ["**Delegation Letter**"].

[41] HDI's Written Interrogatories for Ontario Energy Board (HDI_IR_OEB_20220412), 6-HDI-3, Question 1; Procedural Order No. 3. Note that the Project was referred to as "EB-2022-0012" in HDI's written interrogatories.

[42] Delegation Letter at 1.

53. The Crown cannot claim to have discharged its duty to meaningfully engage with the Haudenosaunee when it has failed to conduct, or disclose, a preliminary assessment.[43] This failure has not been remedied. Unless and until the Crown discloses its preliminary assessment to HDI, along with any supporting documentation, its engagement obligations remain outstanding and unfulfilled.

4. The Crown's processes do not provide a means for meaningful engagement

54. The Board has made clear throughout the Leave to Construct Application that it has a process to ensure concerns related to the Crown's duty are considered in leave to construct proceedings:

> The OEB has a process 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. The OEB's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario **set out the requirements that applicants must fulfil with respect to Indigenous consultation for leave to construct projects**. This includes the filing of an Indigenous consultation report which describes the consultation activities that were undertaken, copies of communications and a summary of any rights-based concerns raised by Indigenous communities, and a description of what (if any) accommodations were proposed. The purpose of these requirements – in conjunction with interrogatory responses related to that evidence, any additional evidence filed by other parties, and final argument - is to **provide the OEB with a record sufficient to allow it to determine if the duty to consult has been adequately discharged prior to it issuing a decision on the application**.[44]

55. The thrust of this passage is that: 1) for leave to construct proceedings, an applicant must satisfy certain requirements in respect of Indigenous consultation; and 2) based on the execution

[43] *Saugeen* at paras 6, 51-59, and 61.

[44] Procedural Order No. 3, dated April 18, 2022 [*emphasis added*].

of these requirements, the Board will determine whether the duty to consult has been adequately discharged.

56. The Board's process is deficient for at least the following reasons:

a. the Board takes no active role in the consultation process—it merely determines the sufficiency of consultation after the fact;

b. the process imputes the duty onto the applicant (third party), which is incorrect at law; and

c. the process is unilaterally foisted on the Indigenous group without any prior engagement.

57. **The duty to engage goes well beyond assessment.** At a minimum, Crown engagement requires notice to affected Indigenous groups, disclosure of information, and discussions addressing concerns with the Project.[45]

58. **The duty to engage is that of the Crown, not of a third party.** The duty to meaningfully engage lies with the Crown, not SCPL.

59. **Engagement processes must be developed in concert with the Haudenosaunee.** The Crown's adoption of subordinate legislation, such as the Environmental Guidelines, attracts the duty to engage.[46] However, the Haudenosaunee have never been engaged with respect to the Board's purported adoption of the Environmental Guidelines.[47]

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[45] *Mikisew* at para 64; *Haida* at para 43.

[46] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para 51.

[47] Detlor Affidavit at para 64.

60. The Board's position on the engagement process, which is deficient for the reasons described above, does not, and cannot, comprise a meaningful engagement process.

61. Nor can the Minister's "process" (whatever that may be) amount to meaningful engagement with the Haudenosaunee. To date, the Minister has made no indication of the process it intends to follow in respect of engaging with the Haudenosaunee. This failure in and of itself is a breach of the Crown's duty to engage.[48]

62. From HDI's perspective, the Minister's conduct to date can be described in one of three ways (each of which is problematic and constitutes a breach of the Crown's engagement duties): 1) The Minister (Crown) is solely relying on the Board's deficient process; 2) The Minister is following a process that has not yet been revealed to HDI; or 3) The Minister has not established an engagement process for the Haudenosaunee in respect of the Project.

63. Whichever route the Minister has chosen, it must be made clear to the Haudenosaunee. Guidance about the form of process must be provided so that the Haudenosaunee know how engagement will be carried out, to allow for their effective participation, and to permit the Haudenosaunee to raise concerns with the proposed form of ongoing engagement in a timely manner.[49]

64. The absence of a coherent process aggravates the stress on Haudenosaunee resources since the Haudenosaunee must then expend additional resources to defend its view of the proper scope of meaningful engagement.[50]

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[48] *Clyde River* at paras 23 and 46.

[49] *Clyde River* at para 23.

[50] *Saugeen* at para 32.

65. In any event, the imposition of the Board's view as to what constitutes reasonable engagement without adequate consultation with HDI would be to endorse a version of paternalism entirely inconsistent with the Crown's duties and advancing the goals of reconciliation. It is tantamount to saying: "we know what is best for you and we don't need to hear from you on that issue".[51]

5. The Crown's (In)actions Do Not Constitute Meaningful Engagement with the Haudenosaunee

66. Given the deficiencies in the Crown's process, a review of the substantive aspects of engagement is premature.[52] However, if the Board so chooses to conduct this review, engagement obligations have not been discharged, whether by standards enunciated by the courts, or by the Board's own standards in the Environmental Guidelines.

67. The content and scope of engagement is contingent on the Crown's preliminary assessment.[53] However, even at the lower end of consultation, the Crown must give notice, disclose information, and discuss any issues raised in response to the notice. This means that the Crown must engage with the respondents.[54] Even at this lower end (which HDI submits is not the end from which to approach engagement in this case), the Crown has not fulfilled its engagement obligations.

68. As discussed above, the duty to engage with the Haudenosaunee in respect of the Project lies with the Crown. To date, the totality of the Crown's efforts in respect of its engagement

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[51] *Saugeen* at para 128.

[52] *Saugeen* at para 128.

[53] *Haida* at para 39.

[54] *Long Plain* at paras 102 and 123; *Haida* at para 43; *Mikisew* at para 64; *The Fort Nelson First Nation v BC Oil and Gas Commission*, 2017 BCSC 2500 at para 66.

obligations can be described as: 1) delegating procedural aspects of its duty to engage to SCPL in the Delegation Letter; 2) repeatedly requesting HDI's assessment of the impacts of the Project on the Haudenosaunee's substantive treaty rights (as described below); and 3) refusing to answer interrogatories.[55]

69. These steps do not constitute meaningful engagement in that they, among other things, do not:

a. provide the Crown's preliminary assessment of:

i. the strength of the asserted Haudenosaunee rights, or any supporting documentation;

ii. the scope of its duty to engage, based in part on the assessment in item (i), above and the seriousness of the potentially adverse effect upon Haudenosaunee rights by the Project, along with any supporting documentation;

b. make clear the process the Crown is using;

c. provide or facilitate reasonable resources to HDI to participate in the process; or

d. disclose information requested by or discuss issues raised by HDI.

70. Even if the Environmental Guidelines constitute a meaningful engagement process capable of discharging the Crown's engagement obligations (which is denied), they have not been

[55] Delegation Letter; OEB Staff Interrogatories on Evidence of HDI (OEB Staff_IR_HDI Evidence – Sun-Canadian_LTC_20220520), Staff-2, question 1, Staff-3, question 1; Procedural Order No. 3, April 18, 2022.

followed. According to the Environmental Guidelines, substantive aspects of the duty, which cannot be delegated, include, among other things:

a. a preliminary and ongoing assessment of potential adverse effects on rights; and

b. oversight of the procedural aspects of the duty.[56]

71. As discussed above at paragraphs53 47-53, the Crown has not provided any preliminary assessments. The Crown has also never demonstrated an oversight sole in respect of SCPL's attempts at engagement beyond merely stating that the Crown retains oversight over "all aspects of the process for fulfilling the Crown's duty."[57]

72. Further, according to the Environmental Guidelines, the Minister is to specifically assess the extent of necessary consultation and provide a letter to the applicant expressing its view on the adequacy of Indigenous consultation.[58] HDI is not aware of any assessment regarding the extent of necessary consultation nor a letter expressing the Minister's view on the adequacy of consultation.

73. **Delegation to a third party does not absolve the Crown of its duty**. Regardless of whether the Crown has delegated any engagement duties, the duty lies with the Crown. What must be assessed is the extent of engagement with the Haudenosaunee *by the Crown*. To the extent the Crown relies on SCPL's "engagement efforts," these efforts have fallen significantly short of what is required to discharge the Crown's duty (discussed below in Section 6).

[56] Environmental Guidelines at 16.

[57] Delegation Letter at 2.

[58] Environmental Guidelines at 17.

74. **Repeated requests for details regarding the impact of the Project on Haudenosaunee rights do not constitute meaningful engagement.** The Board's (and SCPL's) repeated requests for HDI to provide details regarding *HDI's* assessment of the impact of the Project on substantive Haudenosaunee treaty rights[59] fundamentally misconstrues the legal requirements of the Crown's engagement obligations.

75. As acknowledged by the Board (see paragraph 50, above), conducting a preliminary assessment is a substantive aspect of the duty to engage that cannot be delegated by the Crown. HDI is not obligated to conduct or disclose to the Crown the details of a preliminary assessment of its own substantive treaty rights and/or how the Project negatively impacts them.

76. Moreover, the Board's repeated requests also ignores the practical realities of conducting a preliminary assessment, particularly including the time, resources, and expense required to do so.[60]

77. In the face of HDI's response, the Crown has made no attempt to ensure HDI has the funding or resources required to conduct a comprehensive assessment of the impacts of the Project on the Haudenosaunee's substantive treaty rights. This issue of appropriate funding is essential to a fair and balanced engagement process and to ensure a level playing field.[61] Courts have routinely

[59] OEB Staff Interrogatories on Evidence of HDI (OEB Staff_IR_HDI Evidence – Sun-Canadian_LTC_20220520), Staff-2, question 1, Staff-3, question 1; SCPL Responses to Interrogatories (IR Responses_SCPL_20220426), 4-HDI-2, question 2.

[60] Detlor Affidavit at paras 43-47.

[61] *Saugeen* at para 27.

found that capacity funding is reasonable in the circumstances.[62] Ultimately, the decision on funding is the Crown's as part of its design and implementation of an engagement process.[63]

78. The Crown's silence on the issue of funding (including, by way of an engagement agreement), despite HDI's repeated assertions that an agreement is necessary to conduct an assessment of impacts on its substantive treaty rights,[64] is representative of its inaction in the engagement process as a whole.

79. Without funding, the Crown's requests for an assessment by HDI are but an invitation to participate in an inadequate process. However, there must be more than an available process. The process must be *meaningful*. The Crown's engagement obligations are not fulfilled by simply providing a process within which to exchange and discuss information (although HDI submits that the Crown did not even do this).[65]

80. The Crown's offer to HDI to participate in a fundamentally inadequate process does not uphold the honour of the Crown.[66]

81. **A refusal to provide information fails to fulfill engagement obligations even at the lowest end of the engagement spectrum.**

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[62] See *e.g.*, *Saugeen* at para 159; *Clyde River* at paras 47-49.

[63] *Saugeen* at para 27.

[64] See *e.g.*, HDI's Response to Written Interrogatories (HDI_IRR_EVD_SCPL_OEB_20220601), STAFF-1, question 2, STAFF-2, question 2.

[65] *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para 77 [***Chartrand***].

[66] *Chartrand* at para 69.

82. SCPL submits that the potential for infringement on asserted rights are non-existent or minor and that Crown's duty may be discharged by giving notice, disclosing information, and discussing issues raised in response to notice (*i.e.*, engagement at the low end of the spectrum).[67]

83. This unsubstantiated assertion does not refer to any supporting documentation and is not based on a preliminary assessment (because one has not been conducted). To the contrary, the Board (referencing materials in SCPL's Application) recognizes that the potential for impacts to harvesting and hunting or to disturb culturally significant artifacts "are not known to occur, only that there is a potential for them to occur."[68]

84. As discussed above, an assessment by HDI of the impact of the Project on the Haudenosaunee's substantive treaty rights has not been conducted because an engagement agreement has not been executed.[69] The Board's willingness to move forward without an assessment of impacts, especially where the Board acknowledges the *potential* for impacts, underscores its lack of meaningful engagement with respect to the Project.

85. Further, SCPL's claim of "non-infringement" incorrectly characterizes Haudenosaunee rights at issue as "asserted rights," despite clear evidence to the contrary that the rights at issue are established treaty rights pursuant to the 1701 Treaty.[70]

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[67] SCPL Argument-in-Chief at para 95.

[68] OEB Staff Interrogatories on Evidence of HDI (OEB Staff_IR_HDI Evidence – Sun-Canadian_LTC_20220520), STAFF-3, question 1, referencing Stantec, "Environmental Report" (December 21, 2021) at s 4.4.10 "Indigenous Interests", p 56.

[69] Detlor Affidavit at para 43.

[70] See *e.g.*, Hill Affidavit at para 28.

86. Even at the lowest end of the engagement spectrum, the Crown must give notice, disclose information, and discuss any raised in response to the notice.[71] The totality of the Crown's efforts to engage, specifically the Board's refusal to answer interrogatories, falls short of what is required even for "consultation at the lower end of the spectrum," and cannot possibly fulfill the Crown's engagement obligations.

6. SCPL's Actions Do Not Constitute Meaningful Engagement

87. While the Minister may delegate procedural aspects of the duty to engage to SCPL, the duty ultimately lies with the Crown. The Crown's lack of engagement cannot be saved by SCPL's inadequate engagement efforts.

88. In an ongoing effort to facilitate the Crown's ability to discharge its duty, HDI developed a process for proponents of development to meaningfully engage with the Haudenosaunee.[72] The engagement process established by HDI is a flexible one whose scope depends on the nature of the project at issue. The scope is ascertained prior to the execution of a comprehensive engagement agreement between the proponent and HDI. The process concludes when the proponent has satisfied HDI that Haudenosaunee principles, rights, and interests have been properly addressed, which is followed by the granting of consent by the HCCC.[73]

89. To date, SCPL has not executed an engagement agreement with HDI.

90. To the contrary, when HDI sent SCPL a draft engagement agreement for its review, SCPL did not respond with proposed revisions or a request to meet and discuss. Rather, SCPL informed

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[71] *Haida* at para 43; *Mikisew* at para 34.

[72] Detlor Affidavit at paras 16-17.

[73] Detlor Affidavit at paras 20-21.

HDI, without evidence or supporting documentation, that it was "of the view that [an engagement agreement] is not necessary given the limited scope of the project and short timeframe of construction (three to four months)."[74] This response was received *after* SCPL had requested the draft Engagement Agreement for consideration.[75]

91. SCPL's refusal is contrary to the goals of reconciliation and meaningful engagement given the reasonableness of HDI's proposal. Capacity funding is common. It is and was reasonable for HDI to avoid spending the Haudenosaunee's community resources to review someone else's project and seek funding as part of its engagement process. The Crown should not reasonably expect the Haudenosaunee to absorb consultation costs.[76]

92. The Environmental Guidelines specifically contemplate this funding: "The procedural aspects of the duty to consult generally include […] providing reasonable resources for Indigenous communities to participate in consultation".[77] SCPL has not even executed this basic procedural aspect of engagement.

93. The Delegation Letter also envisioned SCPL bearing the reasonable costs associated with the procedural aspects of engagement, including paying for meeting costs and making technical support available. The Delegation Letter required SCPL to consider reasonable requests by communities for capacity funding to assist in participating in the consultation process.[78] An

[74] Detlor Affidavit at para 35 and Exhibit "E" at 2.

[75] Detlor Affidavit at para 34.

[76] Saugeen at para 159.

[77] Environmental Guidelines at 16-17.

[78] Delegation Letter at 6.

outright dismissal of the draft engagement agreement disregards the role and responsibilities attributed to SCPL in the Delegation Letter.

94. Where a proponent and Indigenous groups have legitimate concerns and interests at stake, effectively addressing these concerns requires commitments by both parties. Certain commitments require a legally binding agreement in order to be effectively discharged. An engagement agreement enables the parties to enforce obligations that address Haudenosaunee concerns. A contractual relationship ensures compliance with the process.

95. SCPL requested that HDI explain why it has chosen not to file evidence on the impact of the Project on Haudenosaunee rights and interests.[79] The Haudenosaunee cannot provide a meaningful response without an engagement agreement (that makes such an assessment possible). SCPL is asking HDI to do for free what it has contracted Stantec—an international engineering services firm—to do in respect of an environmental assessment.

96. An engagement agreement is akin to the environmental consulting agreements executed between proponents and engineering companies. The difference is the interests at stake. SCPL's favouring of one assessment over the other is telling of its commitments to the goals of reconciliation.

97. SCPL may argue that archaeological or environmental monitoring agreements allow the Haudenosaunee to participate in the engagement process. However, these agreements contemplate *monitoring*, which, by definition, is irrelevant until the Project has commenced and there is

[79] Interrogatories on behalf of Sun-Canadian Pipe Line Limited (SCPL_IR_EVD_HDI_20220520), 4-SCPL-1, question (a).

something to *monitor*. Reasonable resources must be provided for communities to *engage*, which must include, at the very least, assessment of the Project prior to construction.

98. SCPL cannot justify its view that an engagement agreement is unnecessary on the basis that "since the OEB accepted HDI's proposal to provide intervenor evidence and the OEB provided clear expectations on what the OEB expects HDI to address in its evidence in Procedural Order No. 3 which included evidence and explanations for Project-specific impacts to Aboriginal or treaty rights – that HDI's reasonable costs incurred to provide this evidence would be recoverable under OEB's cost award process."[80]

99. SCPL's submission ignores the Board's explicit warning that "[b]eing eligible to apply for recovery of costs is not a guarantee of recovery of any costs claimed."[81] Without a guarantee of costs, or any guarantee of reimbursement, HDI cannot assess the impacts of the Project. It is not feasible for HDI to absorb the cost of effectively analyzing the impacts of the Project without the financial security of an engagement agreement between SCPL and HDI.[82]

100. HDI's request for an engagement agreement is not an attempt to frustrate reasonable, good faith attempts at meaningful consultation.[83] It is the opposite. HDI has acted in a manner consistent with its commitment to a meaningful process of consultation. Its negotiation efforts have been in good faith and its insistence on an agreement represents HDI's best effort to facilitate engagement.

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[80] SCPL Argument-in-Chief at para 88.

[81] Procedural Order No. 1, dated March 22, 2022.

[82] Detlor Affidavit at para 44.

[83] *Haida* para 42.

To the extent SCPL or the Board believe otherwise, HDI would highlight the Supreme Court's comments that mere hard bargaining will not offend an Indigenous peoples' right to be engaged.[84]

101. Unless and until an agreement between SCPL and the HDI is executed, HDI cannot assess the impacts of the Project.[85] Further, without an engagement agreement, HCCC cannot provide its consent to the project.[86]

102. Given that the duty to engage lies with the Crown, SCPL was entitled to proceed without attempting to negotiate an engagement agreement. However, this approach does nothing to advance the goals of reconciliation, and ultimately, SCPL must live with the consequences of its decision, namely, the denial of the Leave to Construct Application by the Board.

103. The Crown cannot now rely on SCPL's actions to discharge its own duties to engage. SCPL's actions fall well short of meaningful engagement. An outright refusal does not constitute good faith negotiation, as required in dealings where Indigenous interests are at stake.[87]

104. If the Board Grants the Leave to Construct Application, it risks perpetuating the notion that proponents need only execute "monitoring agreements" with interested groups, rather than substantively engage and assess the real impacts of a given project. SCPL's view that an engagement agreement is not necessary is not a valid reason to defeat Haudenosaunee treaty rights. SCPL could have contributed more to discharging the duty. It chose not to.

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[84] *Haida* para 42.

[85] Detlor Affidavit at paras 43-47.

[86] Detlor Affidavit at para 41.

[87] *Haida* paras 41-42. *Mikisew* at paras 54 and 64.

7. SCPL cannot legally comment on the impact of the Project on Haudenosaunee rights

105. In its Argument-in-Chief, SCPL alleges that the "facts are that for this Project the potential for infringement on any asserted rights are non-existent or minor."[88] The current judicial framework for engagement with Indigenous peoples, as set out by the Supreme Court of Canada, does not provide for assessment of Indigenous rights and interests by a third-party proponent.[89] SCPL has no legal basis to make this allegation, which should not be accepted at face value by the Board, particularly given that SCPL is incentivized to assess Haudenosaunee rights as minimally as possible.

106. The Supreme Court has made clear that *substantive aspects* of engagement cannot be delegated to a third party[90] SCPL's characterization of Haudenosaunee rights, as a substantive aspect of engagement typically forming part of the Crown's requirement to conduct a preliminary assessment, is not a characterization within SCPL's mandate. If the intention was that third parties would or could undertake an assessment of Indigenous rights and interests, the Supreme Court of Canada could have indicated as such. Instead, it explicitly found that substantive aspects of engagement are to remain with the Crown.

107. The Supreme Court of Canada's findings regarding substantive aspects of engagement are not surprising given the conflict of interest inherently present in situations where a developer must

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[88] SCPL Argument-in-Chief at para 95.

[89] See *e.g.*, frameworks set out in *Haida*; *Tsilhqot'in*; *Mikisew*; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

[90] *Haida* at para 53 explains that "The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments."

engage with an Indigenous community prior to obtaining approval for a project. In such situations, interests of third-party proponents are not necessarily aligned with the subsection 35(1) rights of Indigenous peoples. In the present case, Haudenosaunee rights and interests risk being undermined by SCPL's unilateral assessment.

8. The Board must provide a written response to HDI's questions

108. HDI submitted numerous interrogatories to the Board, primarily relating to the issues raised above, namely, the Minister's delegation to SCPL; the Crown's assessment of cumulative impacts; the provision of capacity funding to the Haudenosaunee, the HCCC, and/or HDI; the Crown's engagement obligations as they relate to the Environmental Guidelines; and the Crown's justification of the infringement of Haudenosaunee rights.[91] The Board refused to respond on the basis that the interrogatory process is an opportunity for parties to engage in further discovery of the evidence, and that the Board is not a party to the proceeding.[92]

109. Given its refusal to respond, and ongoing and unexplained lack of meaningful engagement with HDI, the Board must now commit its position with respect to engagement in writing. As set out in *Clyde River*, "[w]ritten reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed […] Reasons are 'a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation' […] Written reasons also promote better decision making."[93]

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[91] HDI's Written Interrogatories for the Ontario Energy Board (HDI_IR_OEB_20220412), 6-HDI-1 Questions 1, 3, 4, 5, 6.

[92] Procedural Order No. 3, dated April 18, 2022.

[93] *Clyde River* at para 41.

110. If the Board:

(i) is inclined to grant the Leave to Construct Application;

(ii) is somehow of the view that, based on the record before the Board, the Crown and/or the Board has fulfilled its duty to meaningfully engage; and

(iii) refuses to answer or compel the relevant parties to address HDI's questions and concerns to date,

HDI requests these findings in writing as final confirmation of the total failure of the Crown to engage with the Haudenosaunee with respect to the Project.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2022.

GILBERT'S LLP

Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Tim Gilbert

Tel: 416.703.1100
Fax: 416.703.7422

Lawyers for the Haudenosaunee Development Institute