



COMMUNICATION UPDATE

TO:	Mayor and Members City Council
DATE:	October 3, 2022
SUBJECT:	Chedoke Creek Remediation - HW.22.09 (City Wide)
WARD(S) AFFECTED:	City Wide
SUBMITTED BY:	Cari Vanderperk Director, Watershed Management Public Works Department
SIGNATURE:	

Project Delays

Further to the information provided in the Communication Update HW.22.08 on September 20, 2022, the information provided at the September 7, 2022 General Issues Committee in Report PW19008(q), and the recommendations adopted from Report PW19008(r), construction work in preparation for the targeted dredging of Chedoke Creek resumed on Wednesday, September 21, 2022 and has been completed.

The in-water dredging work was planned to commence September 28, 2022. However members of the Haudenosaunee Development Institute (HDI) continue to attend the site (arriving by watercraft within the dredge area and occupying space on the equipment laydown area that needs to be accessed in order to complete the pipeline that connects the dredging machine to the Dredge Material Management Area) expressing they are exercising their treaty rights, which has delayed the work due to health and safety concerns.

As detailed in an email sent to members of Council on September 29 from the Director of Hamilton Water, last Thursday, two members of the HDI arrived onsite via the water, erected a tent, and began building a bonfire on a fenced parcel of land owned by the Royal Botanical Gardens (RBG) on the west bank of Chedoke Creek. This parcel is being used by the contractor, with permission from RBG, as a laydown area for dredging equipment. As per the site access and safety protocol, the City's contractor approached the two individuals and asked them to refrain from starting a fire and to remove their tent and vacate the site, or emergency services would be contacted. The

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OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

individuals refused to leave the site and proceeded to build a fire. The City's contractor contacted emergency services to respond and the Hamilton Police Service (HPS) attended the site. The responding officers had conversations with the members of the HDI and requested that they follow the contractor's site safety protocols, or to otherwise leave the site, both of which were refused. To date, the HPS is continuing to monitor the situation.

Throughout the weekend, continuous attempts were made by the contractor to begin dredging operations. On both days, members of the HDI occupying the equipment laydown area and accessing the water created an unsafe situation, which required the contractor to stop work. These delays will impact the project schedule, potentially impacting the contractor's ability to complete the in-water dredging in advance of the current MECP Order deadline of December 31, 2022. Staff are continuing conversations with the contractor and our contract administrator in order to fully evaluate the critical path and understand the risks of further delays.

Conversations with the HPS regarding response to the site are ongoing. As well, the RBG has been contacted to understand their position regarding the HDI members occupying their land and any actions they may take.

Staff have continued to keep the MECP updated on the situation and are meeting with representatives from the District Office on Tuesday, October 4 to discuss next steps.

Environmental Monitoring Agreements

The recommendations from Report PW19008(r) authorized staff to continue consultations with the Mississaugas of the Credit First Nation, the Huron-Wendat Nation, the Six Nations of the Grand River, and the Haudenosaunee Confederacy Chiefs Council (through their representative agency, the HDI) on the Chedoke Creek Remediation Project as well as to negotiate and enter into agreements, where appropriate, to provide for Indigenous Environmental Monitors to attend the work site throughout the duration of the project.

As an update, please be advised that staff have reached out to each First Nation community who have been consulted throughout the project to discuss their participation in Environmental Monitoring and the terms of any necessary agreements. Conversations with the Mississaugas of the Credit First Nation, the Huron-Wendat Nation, the Six Nations of the Grand River are ongoing and have been positive. Conversations with the Haudenosaunee Confederacy Chiefs Council (through their representative agency, the HDI) have been unsuccessful to date.

Staff have been communicating with the HDI regularly since August 18 to try to find a reasonable accommodation that allows this project to proceed without further delay. Unfortunately, staff have encountered obfuscation and changing demands. At this time,

all communications from the City to the HDI are being conducted through representative legal counsel. However, HDI representatives continue to email City staff and members of Council directly. The most recent communications between the City's Legal Services Division and the legal counsel for the HDI (Gilbert's LLP), are attached to this Communications Update HW.22.09 as Appendix A - Letter to City from Gilbert's LLP Dated September 22, 2022 and Appendix B - Letter to Gilberts LLP from City dated September 29, 2022. The City's most recent letter requests that all actions by the HDI that are delaying the project cease and desist immediately and that all correspondence from the HDI be directed through Legal counsel.

While ongoing and meaningful consultation and project monitoring are important to all parties, ensuring the safety of everyone attending the project site is paramount.

As always, we will continue to keep members of Council informed.

For regular updates on project progress please reference the story map on the Chedoke Creek Remediation website at www.hamilton.ca/chedokecreekremediation.

APPENDICES AND SCHEDULES ATTACHED

Appendix A - Letter to City from Gilbert's LLP Dated September 22, 2022

Appendix B - Letter to Gilberts LLP from City Dated September 29, 2022

September 22, 2022

Delivered By Email to ron.sabo@hamilton.ca

Ron Sabo
Acting City Solicitor
Legal Services Division
Corporate Services Department
City of Hamilton
50 Main Street East, 4th Floor
Hamilton, ON L8N 1E9

Dear Mr. Sabo:

Re: Chedoke Creek Remediation and Hamilton's Urban Indigenous Strategy

We write further to your letter of September 19th, 2022 regarding the remediation of Chedoke Creek and the PW190008(r) report discussed at City Council on September 7, 2022.

Hamilton's Mischaracterization of HDI's Position and Statements

We disagree with your allegation that HDI delayed in communicating its position in respect of the project site. HDI's position has been consistent from the beginning. HDI has never stated that it would, nor did it, block access to the site, prevent any dredging work, or cause a work stoppage. HDI has repeatedly expressed this position with site workers, the media, and Hamilton City Council. It is not sincere to suggest this position was raised for the first time on September 7, 2022 when, as set out in our letter of September 7, 2022, HDI has always been vocal on its position, including in statements to the CBC disseminated broadly as early as August 24, 2022.

To the extent Hamilton maintains its position that "the statements and activities of persons representing the HDI" are not consistent with HDI's position, we would be grateful if you could identify those statements and activities. To date, the City's allegations have been entirely vague or, where we have been provided any particularity, simply not true.

Hamilton's Commitment to "Consult"

Your letter refers to a commitment to "consult" with the Haudenosaunee. More than mere consultation is required. What is required is free and informed consent of the Haudenosaunee or, where Haudenosaunee rights are infringed, justification by a compelling and substantial public purpose, provided that infringement is not inconsistent with the Crown's fiduciary duty. No consent or justification have been provided here.

In any event, your letter carefully limits Hamilton's consultation commitment to the Chedoke Creek remediation project. We have two questions regarding this position:

1. Does Hamilton intend to consult on other projects in Hamilton, given its acknowledgement that Hamilton is on the traditional territory of the Haudenosaunee?
2. In connection with Hamilton’s commitment to “meaningful consultation”, Hamilton is under an obligation to disclose its preliminary assessment of the strength of the case supporting Haudenosaunee rights, and to provide its assessment of the scope of its duty to engage on the basis of those rights. Could you kindly provide that preliminary assessment? Based on your letter’s suggestion that consultation has taken place and is ongoing, this should be readily available, with particulars.¹

Hamilton’s Rejection of UNDRIP, Contrary to the Truth and Reconciliation Commission Calls to Action and Hamilton’s Urban Indigenous Strategy

HDI has proposed a clear pathway forward for meaningful engagement with the Haudenosaunee. Your letter indicates that the City of Hamilton rejects HDI’s proposal, and makes clear that Hamilton has no intention of abiding by its own policy commitments.

Specifically, your letter states unequivocally that Hamilton has not adopted—and in fact rejects—the United Nations Declaration on the Rights of Indigenous People (“**UNDRIP**”), notwithstanding its clear statements to its constituents and neighbours expressly in support of UNDRIP:

- In 2015, the Truth and Reconciliation Commission called upon “federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.”
- In 2019, Hamilton purported to respond to that call to action, developing, formally adopting, and publishing its Urban Indigenous Strategy in June 2019 (the “**UIS**”). We note that the UIS was endorsed unanimously at City Council, including by Mayor Eisenberger.²
- Among its many references to UNDRIP, Hamilton’s UIS states that:
 - Hamilton “should adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework to move forward with reconciliation”; and
 - Hamilton’s “journey to reconciliation must be forged together with Indigenous and non-Indigenous allies who can collectively champion the *United Nations Declaration on the Rights of Indigenous Peoples* as a framework for reconciliation”.

There is no doubt that the UIS leaves Hamilton’s constituents and Indigenous neighbours with the impression that the City of Hamilton itself “champions” UNDRIP—that is, that Hamilton “acts as a militant support of” UNDRIP and its principles. We would presume that the UIS was calculated to do just that.

Unfortunately, Hamilton’s words appear to be meaningless, as your letter confirms that Hamilton has no intention of engaging with the Haudenosaunee in accordance with the principles enshrined

¹ See, for example, [Saugeen First Nation v Ontario \(MNR\), 2017 ONSC 3456 at para 54](#).

² City Council Minutes 19-013 dated July 12, 2019.

by UNDRIP. This is precisely the issue raised by Mr. Bomberry at the City Council Meeting on September 7, 2022:

“When we’re talking about reconciliation; I like to think of that one as a fancy term for ‘saying sorry without saying sorry’. It’s almost become a punchline...from what I see [...], it’s just words...I don’t want to hear ‘reconciliation’ as much as I want to see it...”

Hamilton’s conduct, including its decision to ignore its own policy considerations in the UIS and reject UNDRIP, does not advance reconciliation.

We would invite Mayor Eisenberger to explain to HDI, and to Hamilton’s constituents, how Hamilton can simultaneously reject the *United Nations Declaration on the Rights of Indigenous People* (and therefore the Truth and Reconciliation Commission’s Calls to Action) and purport to be on a “journey to reconciliation” that “honour[s] the history, knowledge, rights, languages and cultures” of Indigenous peoples, including its close neighbours, the Haudenosaunee.

On behalf of HDI, we invite the City of Hamilton to reconsider its position and seriously consider its conduct in view of its important role in advancing reconciliation in Canada. HDI remains open to discuss Hamilton’s engagement on the Chedoke Creek remediation project, and reiterates its request for a framework agreement applicable to future projects in the City of Hamilton.

Yours truly,

GILBERT’S LLP



Tim Gilbert



Hamilton

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Sent Via Email: tim@gilbertslaw.ca

September 29, 2022

Gilbert's LLP
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Toronto, Ontario
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Attention: Tim Gilbert

Dear Mr. Gilbert:

Re: Chedoke Creek Remediation and Council Meeting No. 22-071

Thank you for your letter of September 22, 2022.

Unfortunately, we are not in a position to agree with the discussion in your most recent letter. The City remains willing to proceed in accordance with the recommendations approved by Council further to Report PW19008(r), and it would be appreciated if you could clarify for me whether you are handling the negotiations for a possible monitoring agreement and other items approved under the Report, or if these matters are being handled separately. When Mr. Detlor attended the meeting of the Public Works Committee, he also identified himself as "a lawyer working with the HCCC", and it would be very helpful if you could clarify who is acting as a lawyer and who is acting as a principal, and on which matters.

In the meantime there are new issues that we wish to bring to your attention:

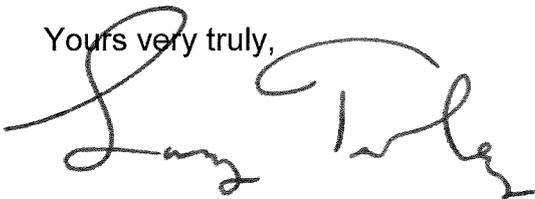
1. Mr. Winters advises that he is being contacted on a continuing basis by Mr. Detlor by emails in which it is alleged that Mr. Winters has acknowledged the existence of rights and claims asserted by the HDI in relation to this matter. While Mr. Winters indicates that these purported acknowledgements are not accurate, and that he is misquoted in the communications from Mr. Detlor, I do not propose to argue about these communications other than to say that Mr. Winters does not have the authority to provide any acknowledgements or recognition on behalf of

the City in relation to any aboriginal or treaty rights asserted by the HDI. We would therefore request that further communications of this nature be discontinued. In addition, we wish to make it clear that your client is only to rely on explicit statements made by the City and that it is not acceptable to rely on silence or any failure to respond as evidence of agreement with any particular proposition or position. Also, with respect to legal representation generally, I wish to confirm my expectation that communications from legal counsel for HDI will be solely directed to the City's legal counsel, and this expectation has an obvious tie-in with the clarification requested in the opening paragraph of this letter.

2. Your letter of September 22, 2022 indicated very clearly that the position of your client is that it will not "block access to the site, prevent any dredging work, or cause a work stoppage." In light of this statement, we wish to bring to your attention certain actions that are occurring on the work site by HDI members that are in fact preventing work from occurring. HDI members attend at the dredging site in watercraft, in some cases even tying their vessels to the dredging equipment, positioning these vessels in ways that make it impossible to commence or continuing work without endangering their personal safety. In addition, the HDI members attending on site refuse to wear the appropriate personal protective equipment required under the Occupational Health and Safety Act, and this too makes it impossible to proceed with work without endangering their personal safety. Representative photographs are attached. Please be advised that these actions are having the effect of preventing dredging work from occurring, and generally are impeding the environmental cleanup that has been ordered by the Ministry. Kindly request that your clients cease and desist from these and any similar actions that are in direct violation of the stated position of your client noted above.

Thank you for attending to these matters.

Yours very truly,

A handwritten signature in black ink, appearing to read "Larry Tansley". The signature is fluid and cursive, with a large initial "L" and "T".

Larry G. Tansley
Solicitor

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Encls.