



Supplementary Information

Presentation from the Sagkeeng First Nation

In the Matter of the

Whiteshell Laboratories

Application to renew the Nuclear Research
and Test Establishment Decommissioning
Licence for the Whiteshell Laboratories site
for a period of ten years

Commission Public Hearing

October 2-3, 2019

Renseignements supplémentaires

Présentation de la Première Nation Sagkeeng

À l'égard de

Laboratoires de Whiteshell

Demande pour le renouvellement, pour une
période de dix ans, du permis de déclassement
d'un établissement de recherche et d'essais
nucléaires pour les Laboratoires de Whiteshell

Audience publique de la Commission

Les 2 et 3 octobre 2019

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Saskeeng Anicinabe

October 3, 2019

Renewal of Whiteshell Laboratories
Decommissioning License

Presentation Agenda

1. Presentation by Sagkeeng Elders, Traditional Knowledge Holders, and Resource Users. (30 mins)
2. Summary of technical submissions. (10 mins)
3. Submissions regarding Duty to Consult and Accommodate. (15 mins)
4. Submissions regarding Sagkeeng's proposed new license conditions. (15 mins)

Unfortunately, Sagkeeng's request to have one hour for its presentation was denied by the Commission.

It would be immensely disrespectful to Sagkeeng's elders and knowledge holders to cut off their traditional knowledge in the middle of their submissions, once the ten allowed minutes expires.

As a result, we are unable to provide Sagkeeng's full presentation.

Duty to Consult and Accommodate

...

The Duty is Owed

The Duty is owed whenever the Crown “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”
(*Haida* para 35)

This is not *Carrier Sekani*

<i>Rio Tinto v Carrier Sekani</i>	This Case
Transfer of same license to new holder	Renewal of expiring license
If no approval, everything stays the same.	If no approval, license expires and licensed activities must stop.
Original impacts were permanent and irreversible.	Impacts triggering the Duty are current impacts, not past impacts.

Talking is not enough

In *Haida*, the Court explained what “meaningful consultation” is, by quoting a New Zealand definition:

“Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed” (Haida at para 46)

What does this mean in practical terms?

*“...consultation must be in good faith, and **with the intention of substantially addressing the concerns** of the aboriginal peoples...”*
(Delgamuukw at para 168)

Accommodation is Required

Consultation requires accommodation, and our courts have said so repeatedly:

- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 SCC 69, para 54:
 - Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

- *R v Kapp* 2008 SCC 41, para 6:
 - The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown

- *Rio Tinto Alcan v Carrier Sekani*, at para 32:
 - “While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation.”

- *Yellowknives Dene First Nation v Canada* 2015 FCA 148 at para 57 :
 - “Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement.”

- *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* 2017 SCC 41 at para 32 :
 - However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

- Mikisew Cree First Nation v. Canada 2018 SCC 40 at paras 55 and 60:
 - The honour of the Crown governs the relationship between the government of Canada and Indigenous peoples. This obligation of honour gives rise to a duty to consult and accommodate....”
 - “And when the government contemplates conduct that might adversely affect Aboriginal or treaty rights, the honour of the Crown gives rise to a duty to consult and accommodate”

- *Labrador Métis Nation v Canada* 2006 FCA 393 at para 30:
 - “The duty to consult goes hand in hand with a duty to accommodate”

The Duty has not yet been fulfilled

- While CNSC staff have engaged with Sagkeeng in meaningful ways, it is not staff, but the Commission itself, which is responsible for fulfilling the Duty.
- The Commission has already limited our participation – our chance for a dialogue to the written submissions and 10 minutes of presentation.
 - In doing so, Sagkeeng elders were effectively prevented from participating

But it can be.

- Sagkeeng has already identified for the Commission how its concerns can be addressed.
- The 21 recommendations submitted by Sagkeeng are, if implemented, a reasonable step forward in addressing Sagkeeng's concerns about this contemplated Crown Conduct
- The recommendations are reasonable and achievable.
- Where the Commission may choose not to adopt them, reasons should be given for why they are not adopted.