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Supplementary Information

Oral presentation

Written submission from the Passamaquoddy Recognition Group Inc.

Renseignements supplémentaires

Exposé oral

Mémoire du Passamaquoddy Recognition Group Inc.

In the Matter of the

À l'égard de la

New Brunswick Power Corporation, Point Lepreau Nuclear Generating Station

Société d'Énergie du Nouveau-Brunswick, centrale nucléaire de Point Lepreau

Application for the renewal of NB Power's licence for the Point Lepreau Nuclear Generating Station

Demande de renouvellement du permis d'Énergie NB pour la centrale nucléaire de Point Lepreau

Commission Public Hearing
Part 2

Audience publique de la Commission
Partie 2

May 10 to 12, 2022

10 au 12 mai 2022

Canada

Submission by the Passamaquoddy Recognition Group Inc.
PRGI PO Box 144 St. Stephen NB E3L 2XL

To the Canadian Nuclear Safety Commission
Regarding The Renewal of the Point Lepreau Nuclear Generating Station Power Reactor Operating Licence

Hearing Reference: 2022-H-02

SUPPLEMENTAL DOCUMENTATION TO CMD22-H2-244

April 27, 2022

We look for you and your kin on the horizon of the future, where we become history-makers together.

Prepared by
Kim Reeder, Master of Environmental Management
As a settler editor, I invite serious examination and investigation of this and the connected primary document CMD22-H2-244, being aware that no colonial source can bring to light the truest form of Peskotomuhkahti perspective. As discussed by former Chief Justice of British Columbia Lance Fitch, "…it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture's values and laws."

Disclaimer
This submission by PRGI is not an endorsement of the CNSC's hearing process, its independence as a regulator, or its outcomes.

Effective nation-to-nation relationships will require openness and humility. Anishinaabeg scholar Lindsay Borrows provides this perspective:

> *Humility is a state of positioning oneself in a way that does not favour one's own importance over another's. Humility is a condition of being teachable. Humility allows us to recognize our dependence upon others and to consider their perspectives along with our own…In English, the etymological origin of humility is derived from the Latin word humilis, which literally means "on the ground" from Latin humus meaning "earth."*[1]

[1] Borrows, Lindsay, *Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape* 33 Windsor Y.B. Access to Just. 149, (footnotes removed) cited in Guide for Lawyers Working with Indigenous Peoples, 2018. A joint project of: The Advocates' Society the Indigenous Bar Association The Law Society of Ontario

We look for you and your kin on the horizon of the future, where we become history-makers together.

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It has recently come to our attention that there are detrimentally inadequate pressure relief valves installed in the primary heat transport system – valves that are NOT in accordance with ASME recommendations. We understand that PLNGS is currently in the midst of a planned shut down, therefore due to the danger posed by the inadequately sized pressure relief valves, we recommend that PLNGS not be restarted until the CCNR's recommendation 4, (in their supplementary documentation for Hearing 2022-H-02), is implemented. The recommendation reads, "… the Commission does not approve a Power Reactor Operating Licence (PROL) for Point Lepreau unless and until fully adequate pressure relief valves are installed in the primary heat transport system – valves that are in complete accordance with ASME recommendations."

Introduction

In our original submission (CMD22-H2-244), we shared relevant Indigenous knowledge and how it can be applied in decision-making relative to PLNGS. This supplementary document shares further understanding of our duties to each other as treaty people, and the duties of all of us, to protect environmental and human health.

Your upcoming decision on the relicensing of PLNGS has significant potential to adversely harm the health of our nation. The relicensing of PLNGS, the SRWMF and approval of the decommissioning plan and financial guarantee infringes on access to our territory and all life within. Our title is being infringed upon by the presence of PLNGS and its toxic waste. The emissions and toxic waste contaminate our homeland including our food sources (thus infringing on gathering, fishing and hunting), and infringe on our ability to fulfill our cultural and spiritual practices – the most offensive of which is barrier created which stops us from carrying out our duty to caretake our homeland's ecosystem. The CNSC mandate is concerned with the protection of the environment and human health, but **for us the health of the environment *is our health*.**

The implications of your decision will reach far beyond the next seven generations, especially considering:

1) the potential for toxic waste to remain on site for a very long time, if not in perpetuity, due to lack of funds, if the financial guarantee for PLNGS is inadequate and approved (see Appendix A),

2) NB Power's failure to address within its application, the impact of new developments, including potential Small Modular Nuclear Reactors (SMNRs) and a reprocessing facility (see Appendix A) and,

3) NB Power's failure to address within its application, the criteria by which climate change impacts and natural external events have been assessed and evaluated against the 25-year licence application.

We ask that your decision reflects the true meaning of reconciling. Your task is not easy – vastly different languages, cultures, and world views present real impediments to effective communication and shared decision-making. We come to the table offering all we can in pursuit of productive nation-to-nation relations.

Indigenous collectives have a profound relationship to the earth in which the integrity of their territorial lands and their relationship cannot be compromised without significant social, cultural, and spiritual impact.

Frye & Mitchell, 2016

Duty to Consult

The Supreme Court of Canada affirmed in landmark decisions such as Haida (2004), Taku River (2004) and Mikisew Cree (2005) that the Crown has a duty to consult when three elements are present:

Contemplated Crown conduct;

Potential adverse impact; and

> Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the Constitution Act, 1982.[2]

In the case of relicensing PLGNS, the SRMWF and the approval of the decommissioning plan and financial guarantee, all three elements are present.

Duty to Learn

In addition to the term *Duty to Consult*, an associated term was introduced by former Chief Justice of British Columbia Lance Finch – the *Duty to Learn*. In his 2012 paper, *The Duty to Learn; Taking Account of Indigenous Legal Orders in Practice*, Justice Finch points to the Canadian jurisprudence making clear the obligation to take into account the Aboriginal perspective, including R. v. Sparrow, [1990] 1 S. C. R. 1075, R. v. Van der Peet, [1996] 2 S. C. R. 507, and Delgamuukw v. British Columbia, [1997] 3 S. C. R. 1010.

The former judge's writings also apply to our case - the relicensing hearing for PLGNS, the SRWMF, the decommissioning plan and financial guarantee associated with PLNGS. The commissioners' decisions will impact our rights and may be reviewed by the courts.

Former Chief Justice Fitch was concerned with the question of *how*, in a nation where more than two legal systems exist, to effect the recognition of Indigenous legal orders in a principled and effective manner, and stated,

> *We speak often in the field of Aboriginal law of the honour of the Crown, which mandates, among other requirements, the duty to approach questions of interpretation generously, the duty to consult and the duty to accommodate.* ***Now I suggest, a more widely applicable concept of***

[2] Government of Canada. 2011. Aboriginal Consultation and Accommodation. Updated Guidelines for Federal Officials to Fulfill the Duty to Consult

> ***honour imposes on all members of the legal profession the duty to learn: at the very least, to holding ourselves ready to learn.*** *In addition, the legal obligation to take account of the Aboriginal perspective engages the principle of the rule of law.* ***If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests.***[3]

Former Chief Justice Finch also relays statements from *Canada's Indigenous Constitution*,[4] in which the author Professor John Burrows states,

> *Those who evaluate the meaning, relevance and weight of Aboriginal legal traditions must…appreciate the potential cultural differences in the implicit meanings behind implicit messages if they are going to draw appropriate inferences and conclusions. They should attempt to grasp their unspoken symbolic aspects in order to evaluate their truth and value. Mastering both these facets of interpretation is a tremendously difficult and complex task…****This evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge and fails to acknowledge his or her own bias.***

Former Chief Justice Fitch reminds us that most of what society knows about Indigenous culture is gleaned from non-Indigenous sources. He rightly states, "we are not formally trained in, for example, anthropology or historiography, or in any comparable discipline which would equip us with the critical and methodological

[3] Finch, L. (2012). The duty to learn: Taking account of Indigenous legal orders in practice. paper delivered at Indigenous Legal Orders and the Common Law, Vancouver.
[4] Borrows, J. (2010). Canada's Indigenous constitution. University of Toronto Press.

tools required to research and analyze other cultures' normative belief systems."[5] He references the words of the late scholar Marlee Kline who reinforces the enormity of this challenge stating, "Despite centuries of contact with First Nations, and the changing conditions of their lives, 'real Indians' are constructed by the dominant society as those who live as they did before or during the early period of European contact." Of course, this has significant implications, including the massive risk for misunderstanding and continuing the status quo which involves paying only lip service to meaningful reconciliation and continuing egregious rights abuses.

Interpretation of the words of former Chief Justice Finch lead us to believe that a precondition of the principled application of the work of the Commissioners is to view, as far as possible, this relicensing decision from the cultural lens of the Peskotomuhkahti. However, Finch also discusses that ability and/or readiness to do so, may not be present – that the community of decision makers – including yourselves – may not be ideologically or perceptually ready for this task which is also a precondition of application of principled decision making.

We come to this discussion willing to assist in your Duty to Learn by enabling as much as possible, understanding of our culture and law. The interactions associated with this relicensing and hearing process should be viewed as an opportunity for continued advancements towards reconciliation, rather than as a problem in need of a solution.[6] We must each do our utmost to recognize and

[5] Finch, L. (2012). The duty to learn: Taking account of Indigenous legal orders in practice. paper delivered at Indigenous Legal Orders and the Common Law, Vancouver.
[6] Guide for Lawyers Working with Indigenous Peoples, 2018. A joint project of: The Advocates' Society the Indigenous Bar Association the Law Society of Ontario

relinquish our preconceptions, as this is one part of the reconciliation agenda that lies within our immediate control.[7]

[7] Finch, L. (2012). The duty to learn: Taking account of Indigenous legal orders in practice. paper delivered at Indigenous Legal Orders and the Common Law, Vancouver.

The task for which we are attempting to equip ourselves is not only that of making space within the *known* landscape…it is a matter of attempting, in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical and cultural. In the process of entry, the important qualities of mind to adopt, or aspire to are respect and receptivity. To enter a landscape empty-handed is to do so with all sense open, sharpened by a sense of its vastness, its permanence, and its inseparability from the larger world. Respect, in this context is simply the acknowledgement that we are all human, we are all different, and that no matter how important they may be, our values cannot be treated as absolute and exclusive. We all have much to learn from one another. Receptivity must take account of context, including the context of the colonial enterprise and the injustice it has so often created…Receptivity involves acknowledgement of real past and present wrongs: receptivity to the memory of such wrongs, that is, as well as to new knowledge.

Former Chief Justice of British Columbia Lance Finch, 2012
The duty to learn: Taking account of Indigenous legal orders in practice.
Paper delivered at Indigenous Legal Orders and the Common Law, Vancouver.

Decision-making environment

Today, the Government of Canada refers to the Treaties between the Wabanaki nations and the Crown as “Peace and Friendship Treaties.” They are unlike later treaties signed in other parts of Canada. The Peace and Friendship Treaties did not involve First Nations surrendering rights to the lands and resources they had traditionally used and occupied.

In 2016, representatives of the Governments of Canada and New Brunswick met with the Peskotomuhkati Council around the ancient fireplace of the Peskotomuhkati Nation. The three governments agreed that the principles of the existing treaties between the Peskotomuhkati Nation and the Crown would continue to guide and govern their relationship. The principles are those of the Covenant Chain: respect, trust and friendship.

Incomplete Assessments

The basic methods include estimating toxicity, estimating exposure, and comparing potency of toxicity with expected exposure.[8]

Your decision related to the relicensing of PLNGS, SRWMF and decommissioning is about balancing benefits to humans (energy production) versus the costs to humans and the ecosystem. However, the multiple assessments used as the basis of your decisions exclude essential human factors – the social, cultural, and spiritual values, beliefs, and practices at risk.

The purpose of the risk assessments therefore seems to be to justify acceptable levels of harm and exposure. However, we as society ignore the much more difficult task of finding ways to prevent impacts, stop emissions and discharges, remediate existing problems, and find solutions to restore the damage that has been done.[9]

[8] Arquette, M., Cole, M., Cook, K., LaFrance, B., Peters, M., Ransom, J., ... & Stairs, A. (2002). Holistic risk-based environmental decision making: a Native perspective. *Environmental health perspectives*, *110*(suppl 2), 259-264.
[9] *Ibid.*

We look for you and your kin on the horizon of the future, where we become history-makers together.

Health

> **You don't come with guns anymore;**
>
> **you come with briefcases, and we kill ourselves.**
>
> Raymond Quock, Tlingit/Talhtan man

Health means more than just the absence of disease or injury. The Peskotomuhkati has its own unique history of exposure to toxic substances, but it is important to recognize that exposure is only one element of susceptibility to ill health. Contrary to the conclusions of current risk assessment models, adverse health effects can and do occur even when no physical exposure to toxicants has occurred.[10] Adverse health effects can result when people stop traditional cultural practices to protect their health from the effects (or perceived effects) of toxic substances. These effects can be felt at the extended family, community, and Nation level. In addition, time is an important component to health, because protecting future generations is key to ensuring good cultural health. Our social, cultural, and spiritual values, beliefs, and practices are not just 'valued components', they are not solely a 'context' for risk assessment – they involve complex interactions of many critical factors which profoundly affect our health.

> **The complex relationship between Indigenous peoples and the land has been described as a profoundly significant one related to cultural survival, economic and environmental sustainability, communal and individual identity, and spiritual and physical health.**
>
> (Duran, 2006; Fry & Mitchell, 2016; Laduke, 1999; RCAP, 1996).

[10] *Ibid.*

We look for you and your kin on the horizon of the future, where we become history-makers together.

Colonial Trauma is described as a complex, continuous, collective, cumulative and compounding interaction of impacts related to the imposition of colonial policies and practices which continue to separate Indigenous Peoples from their land, languages, cultural practices, and one another.

Mitchell & Arseneau, 2019

Health encompasses concepts of wellness that integrate physical, mental, social, and ecologic well-being. Health is supported by the solid foundation, and relationships with a healthy natural and spiritual world, as well as our relations with other humans. Research has clearly shown that the degree of control that people have in their life and their capacity to act, are key influences on health.[11] ***We*** **must therefore assess the impacts of PLNGS and its toxic, long-lived waste in a holistic manner which includes the social, cultural, and spiritual values, beliefs, and practices that link us to our environment.**

If we avoid traditional foods and medicines, if we do not feel safe to continue cultural and spiritual practices, if we cannot fulfill our duties to protect our community, our future generations and our territory, then, our rights have been infringed, and as a Nation, we are not in good health.

"Our knowledge comes from the land, and the destruction of the environment is a colonial manifestation and a direct attack on Indigenous knowledge and Indigenous nationhood ..."

Simpson, 2004

[11] Evans R, Barer M, Marmor T. Why are Some People Healthy and Others Not? The Determinants of Health of Populations. New York:Aldine De Gruyter, 1994.

We have assessed these critical elements and we are telling you that the existence of PLNGS and its waste are significantly, and negatively, impacting our health.

In 1997, in Delgamuukw, the Supreme Court of Canada recognized that oral history should be accommodated and placed on an "equal footing" with documents.[12] The western preference towards written records and technical assessments is undermining the potential for reconciliation. Reconciling must be transformative and comprehensive, touching on virtually every aspect of Canadian life – including the relicensing decision of PLNGS.

The social determinants of health need to be significantly modified to include political dimensions such as government policies, environmental legislation, and extractivism all of which are critical to protecting and improving the health status of Indigenous populations.

Mitchell & Arseneau, 2019

A New Paradigm

We need a new standard and associated processes that enable shared decision making with Indigenous rightsholders such as ourselves. We often find ourselves in a reactive mode, committing valuable resources to constantly comment on and attempt to improve poorly conducted projects and processes. Much of the time, to be 'heard' we are forced to use an 'expert approach', which is far removed from our cultural methodologies. We need to move away from current approaches and toward collaboration and partnership. Decision makers also must consider the very specific legal requirements associated with

[12] Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 87, 153 DLR (4th) 193 [Delgamuukw].

Indigenous populations, such as ours. For example, by virtue of our treaty status, we have an even greater legal and moral right to be involved on a Nation-to-Nation basis in any decision making that affects our people, lands, and aboriginal and treaty rights. By using exclusively 'western science' and top-down models, the capacity for science to create change is very limited.[13] We must move into a new a new phase of inter governmental arrangements of mutual respect.

Duty to Cooperate

In the Haida decision, the Supreme Court took the idea that indigenous peoples were and are sovereign, as real, tangible, without doubt, and they referred to Crown sovereignty as assumed or asserted, but not proven.[14] We should all understand then, that the Peskotomuhkahti are a sovereign nation, that we have never renounced our sovereignty, nor had it legally taken from us. Canada is therefore required to do more than receive and understand our concerns. Canadian government bodies have been directed to advance a nation-to-nation relationship. Public policy expert and internationally respected scholar

[13] Arquette, M., Cole, M., Cook, K., LaFrance, B., Peters, M., Ransom, J., ... & Stairs, A. (2002). Holistic risk-based environmental decision making: a Native perspective. Environmental health perspectives, 110(suppl 2), 259-264.
[14]McNeil, K. (2020). Shared Indigenous and Crown Sovereignty: Modifying the State Model. Osgoode Legal Studies Research Paper - More recently, the Supreme Court has begun to exhibit some discomfort with the notion that the Crown could acquire sovereignty by mere assertion, confirmed by a treaty with the United States. In two decisions released simultaneously in 2004, Haida Nation v. British Columbia (Minister of Forests) and Taku River Tlingit First Nation v. British Columbia the Court, for the first time, acknowledged "pre-existing Aboriginal sovereignty", referred to Crown sovereignty as "de facto", and said that the promise of rights recognition in section 35 of the Constitution Act, 1982 "is realized and sovereignty claims reconciled through the process of honourable negotiation." But if the Indigenous nations of British Columbia were sovereign prior to Britain's assertion of sovereignty in 1846, how could the Crown have acquired sovereignty over them and their territories without conquest and without treaties with them that recognized Crown sovereignty? A possible international law answer is prescription, which involves the peaceful exercise of de facto sovereignty for a sufficiently long time, but apparently de jure sovereignty could only be acquired by prescription if the prior sovereigns acquiesced, which the Indigenous nations have not. Moreover, prescription could not have applied in 1846 because the Crown's exercise of sovereignty did not even commence over most of the province until many years later.

Ian Peach, describes this as *the duty to cooperate*. However, Peach also highlights, in his paper, *Making the Canadian Federation Complete*,[15] (Appendix B)

> Today, the UN Declaration on the Rights of Indigenous Peoples provides additional stimulus for the recognition of Indigenous sovereignty, by declaring that Indigenous Peoples have the right to self-determination, to freely determine their political status, to distinct political, legal, economic, social, and cultural institutions, and to freely pursue their social, economic, and cultural development (United Nations 2008: articles 3-5, 20). … Making the practical, functional arrangements necessary to make co-sovereignty operate in the real world of Canadian governance, though, will require Indigenous nations and the Crown, in both its federal and provincial/territorial dimensions, to establish an ongoing relationship and negotiate the arrangements that will allow both sovereign orders of government to work together to share their sovereignty. Luckily, we in Canada have a great deal of experience and expertise in managing shared sovereignty, from our 150 years as a federation under the Constitution Act, 1867. If we see the question of how to create a space for co-sovereign Indigenous nations to be self-governing within a shared constitutional order today as, essentially, a question of federal governance that builds on these long-standing traditions of mutually recognized and shared sovereignty between distinct political communities within Canada, we have a vast wealth of political practice and jurisprudence to draw on.

[15] Peach, Ian. 2018. Making the Canadian Federation Complete. Optimumonline.ca vol. 48, no. 1 (spring 2018)

Peach draws upon the Supreme Court of Canada's description of federalism during the *Quebec Secession Reference, and* further suggests that the "…principle is the most important one for understanding how to integrate Indigenous sovereignty into Canada's structure of governance." He also highlights, "Federalism is also familiar to Indigenous peoples as a means to divide sovereignty. One need only look, for example, to the Wabanaki Confederacy in what is now the Maritime provinces and the US Northeastern-most states."

Finally, Peach offers,

> …we should seek an honourable way to secure the reconciliation of the two sovereignties that exist within this shared geographic and political space within the constitutional apparatus of the Canadian state (Peach 2009: 164). If settler-state governments were to develop policies to recognize and help realize Indigenous self-government that were consistent with the two fundamental constitutional principles of federalism and the protection of minorities, as interpreted through the lens of the other fundamental constitutional principle that must be respected in the Crown's relationship with Indigenous peoples, that of reconciliation, it is possible to imagine that finally today, over 150 years after the creation of the federation of the British North American colonies began, the Canadian federation could finally begin the process of becoming complete.

Highlighting Mutual Concerns

Additional to the concerns, recommendations, and requests in our original intervention, CMD22-H2-244, we highlight, and echo, the following specific

recommendations from the intervention of Coalition for Responsible Energy Development in New Brunswick (CRED-NB) and the Canadian Environmental Law Association (CELA) – CMD22-H2-194.

Recommendation *IV. PRELIMINARY MATTERS & PROCEDURAL CONCERNS, A. Pre-hearing procedures should be adopted.*

When reviewing the statements of other intervenors, we realized that many interventions were entirely or partially outside of the mandate of the CNSC. We then followed up with the CNSC to inquire how these interventions will be considered and/or included. It seems that there is no transparent process for how the Commissioners will weigh issues not within the mandate of the CNSC. The CNSC response to our query: "Intervenors' presentations will often contain various elements that might not all be completely within the mandate of the Commission. It will be up to the Commission Members to determine what is relevant and what they need to consider in relation to the decision that they have to make."

In the meantime, the Peskotomuhkati team conducted in-depth and time-consuming analysis to ensure that we presented our concerns as directly linked to the mandate of the CNSC. If this was not required, we need to understand that.

Therefore, we highly support the CRED NB/CELA recommendation that *Pre-hearing procedures should be adopted.*

Given that there has not been a public scoping of issues, whereby the issues and interventions were framed, we submit that PRGI's comments provided herein are not out of scope and indicate that if we had known the process was so flexible, we would have delved much further into the financial debacle that is linked to nuclear power in New Brunswick. As well, we would have expanded our

discussion on what we perceive as the direct relevance of this relicensing application to enabling SMNRs in New Brunswick, an effort we do not support.

On the issue of SMNRs, we must ensure that the small modular nuclear reactors (SMNRs) proposed in Canada are fully subject to the federal *Impact Assessment Act*. Currently, SMNRs are not required to undergo an IA because the Act adopts a threshold list, and only reactors above 900MW thermal (300 MW electric) on an existing nuclear site, require review. The Peskotomuhkati are very concerned about proposed SMNR projects, their impacts to the health and wellbeing of the environment and communities, and the intergenerational risks they pose. Therefore, we also support, highlight, and add to the CRED NB/CELA *Recommendation 7, that the renewal of nuclear operating licences* (and we add, SMNRs*) should be fully subject to the federal Impact Assessment Act so that considerations of the need and purpose of the project, as well as alternatives, can be fully assessed against a range of factors including accidents and malfunctions, cumulative effects, sustainability, identity factors and Indigenous knowledge* and culture (as described above).

We also draw attention to the CRED-NB/CELA recommendation under IV. PRELIMINARY MATTERS & PROCEDURAL CONCERNS, *B. Transparency and disclosure of documents must be a priority in all licensing hearings, i. Environmental justice and public disclosure.*

While we appreciate the efforts of CNSC and NB Power staff to promptly respond to information requests and questions received leading up to this hearing, we echo CRED NB/CELA's request for the public release of studies and assessments relied upon and/or referenced by proponents in their licence application, as well as documents relied upon and/or referenced in the CNSC staff

produced CMD related to their recommendation. This should include the proposed licence and Licence Conditions Handbook being available for public dissemination when these documents are publicly released. As stated in the CRED NB/CELA intervention, the current approach is contrary to the guidance of the International Atomic Energy Association ("IAEA"), who notes in their document, *Stakeholder Involvement Throughout the Life Cycle of Nuclear Facilities*, which states, "emphasis must be placed on trust by the community of the organizations and institutions involved in the process. Reliability, responsibility and fairness are attributes that foster trust in those participants in decision making processes."[16]

We again bring attention to the outright denial of our request for documentation related to the most recent reports from each, the Nuclear Safety Review Board (NSRB) and Corporate Nuclear Oversight Team (CNOT). This inhibits our review of procedures and activities which have direct bearing on the lands and waters of our traditional territory and works against the building of trust.

We also support many of the sentiments of the following intervenors:

- the Nuclear Transparency Project – CMD22-H2-194
- Larry Lack and Leeanne Ward – CMD22-H22-202
- Beth McCann – CMD22-H2-185
- Carol A Ring - CMD22-H2-181
- the Canadian Coalition for Nuclear Responsibility – CMD22-H2-228
- Northwatch - CMD22-H2-220
- Ann McAllister CMD22-H2-198
- Rural Action and Voices for the Environment CMD22-H2-197
- Kelly Newman - CMD22-H2-186
- Dr. Jennifer Hannigan – CMD22-H2-171
- PEACE-NB - CMD22-H2-139

[16] International Atomic Energy Agency, "Stakeholder Involvement Throughout the Life Cycle of Nuclear Facilities" (2011), online: https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1520_web.pdf at p 6 [IAEA Guidance on Stakeholder Involvement], as cited in CMD22-H2-194.

- Leap4wards - CMD22-H2-5
- Margaret R. MacDonald – CMD22-H2-3
- Helmy Ragheb – CMD22-H2-177
- Jean Desrosiers – CMD22-H2-8
- Kathleen Henderson – CMD22-H2-9
- Michael Greene – CMD22-H2-10
- Auréa Cormier - CMD22-H2-11
- Ryan Hillier - CMD22-H2-12
- Elaine Hughes - CMD22-H2-13
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- Amy Floyd - CMD22-H2-15
- Heather Reed - CMD22-H2-16
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- Dawn Mockler - CMD22-H2-18
- Thomas G. McAlister - CMD22-H2-19
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- Joan Green - CMD22-H2-96
- Karen Daley - CMD22-H2-97
- Faye Arbou - CMD22-H2-98
- Penny Kollar - CMD22-H2-101
- Mike Farrell - CMD22-H2-102
- Christian Boudreau - CMD22-H2-103
- John D. Jacobs - CMD22-H2-104
- David J. Beaudin - CMD22-H2-105
- Catherine Gillespie - CMD22-H2-106
- Paula Tippett - CMD22-H2-107
- Mark Collrin - CMD22-H2-108
- Mark LeBlanc - CMD22-H2-110
- Lanaye Dempsey - CMD22-H2-111
- Karla D Robinson - CMD22-H2-115
- Daniel Serre - CMD22-H2-116
- Justin Legacy - CMD22-H2-118
- Helen Carter - CMD22-H2-119
- Roberto Montebelli - CMD22-H2-122
- Christopher Corey - CMD22-H2-123
- Denise Maillet - CMD22-H2-126
- Priscilla Trecartin - CMD22-H2-127
- Deborah E. Velux - CMD22-H2-128
- Sustainable Energy Group Carleton County - CMD22-H2-129
- Aline Michaud - CMD22-H2-130
- Tatiana Dedam - CMD22-H2-131
- Aarika Allen - CMD22-H2-133
- Tanya MacBean - CMD22-H2-134

- Robyn Connell - CMD22-H2-135
- Kelly M. Piers - CMD22-H2-140
- Kayla McGarity - CMD22-H2-141
- Rose Doucet - CMD22-H2-153
- Cathy Leonard - CMD22-H2-155
- the Comité des 12 - CMD22-H2-159
- Mary Milander - CMD22-H2-160
- Nancy Strabac and Fred Hudson - CMD22-H2-162
- Lutz E. Becker - CMD22-H2-163
- Kathryn Opyc - CMD22-H2-164
- Helen Soucoup - CMD22-H2-165
- Megan Kellestine - CMD22-H2-166
- Lynne Kennett-Read - CMD22-H2-167
- Tony Reddin and Marion Copleston - CMD22-H2-168
- Jessica Buckley - CMD22-H2-169
- Tom McLean - CMD22-H2-170
- Linda Melanson - CMD22-H2-172
- Lise Ethier - CMD22-H2-173
- Mary Ellen Stevenson - CMD22-H2-178
- Nancy Covington - CMD22-H2-187
- Anne Lindsey - CMD22-H2-191
- Daniel Beaudry - CMD22-H2-203
- Renée Turcotte - CMD22-H2-206
- Kim Leffley - CMD22-H2-207
- Douglas Carmody - CMD22-H2-211

You can't just steward nature in a monarch garden or a bird observatory, it has to be *always* – with every fiber of your being, or it doesn't make sense. You can't pick the whale and dismiss its food - the plankton, you can't pick the Bay of Fundy, but dismiss the seal stranded in the fore bay. It doesn't work like that.

We need to look upon knowledge holders with reverence, we must consider those with lived experience. The intervenors listed above, including our

community and experts such as Dr. Edwards, Dr. Fairlie and Dr. O'Donnell, bring questions to the table which should be met with excitement: an opportunity to challenge and improve our governance systems, our management systems, our licensing systems, and our operating systems. We believe that these interventions require serious consideration, accommodation, and reflection in your relicensing decision.

We seek to meet our responsibility of protecting future generations and the environment by requesting the initiation of the process to decommission the PLNGS and the Solid Radioactive Waste Management Facility ("SRWMF"). We also acknowledge the related financial and energy management challenges. We invite a 3-year relicensing period over which we can engage more thoroughly on how to reconcile these concerns and initiate decommissioning together. We want to be part of realistic energy solutions that will contribute to the long-term health of our homeland's ecosystem and all who live within.

Do not allow this re-licensing to be a compounding colonial assault, stacked upon the traumatic burden of hundreds of years of disease, land appropriation, starvation, and banning of cultural and religious practices imposed upon our peoples.

Conclusion

We ask for you to confirm, with your decision relative to the relicensing of PLNGS, the SRWMF and the decommissioning plan, that you respect our knowledge and trust our experiences, observations, and data-collection abilities. We have countless generations of knowledge about the interdependence among humans, the natural and spiritual worlds of our homeland. We possess a unique ability to contribute to solving many of the human health and ecologic crises

faced in this century. Given the need to minimize the time in which individuals, communities, and ecosystems are negatively impacted, we see that the time is now, to make these right decisions.

In a review of the mental health of the world's Indigenous populations Cohen (1999) wrote of the contemporary form of corporate colonialism and the threat to place-based peoples linking Indigenous Peoples relationship with land and the disruption of their life way to their health:
Indigenous peoples continue to be seen as standing in the way of development…and while they are no longer subjected to the brutal methods of slaughter and dislocation that were employed in the past, they are still subject to forces used with the intent to remove them from the land and destroy their way of life.

The Peskotomuhkati submit that anything other than a 3-year licence is patently unreasonable in the circumstance and should be denied.

- Neither the NB Power request for a 25-year licence nor the CNSC staff recommendation for a 20-year licence acknowledges or respects the Crown's unique relationship with, and obligations to, the Peskotomuhkati;
- Neither the NB Power request for a 25-year licence nor the CNSC staff recommendation for a 20-year licence is aligned with the United Nations Declaration on the Rights of Indigenous Peoples (for instance Articles 18, 32, 29);
- Neither the NB Power request for a 25-year licence nor the CNSC staff recommendation for a 20-year licence promotes reconciliation of Indigenous and other societal interests (for example, in 2002, the New Brunswick Energy and Utilities Board concluded that the proposed refurbishment of Point Lepreau was not in 'the public interest').

- Neither the NB Power request for a 25-year licence nor the CNSC staff recommendation for a 20-year licence fosters better relations between the federal government, the industry, the province, the public and Peskotomuhkati peoples;
- Both the NB Power's request for a 25-year licence and the CNSC staff recommendation for a 20-year licence fail to consider the impact of new developments, including a potential Small Modular Nuclear Reactor and reprocessing facility;
- NB Power's request for a 25-year licence extends beyond the operating life of the facility;
- Both the NB Power and the CNSC staff's consideration of risk related to Point Lepreau is insufficient to protect holistic human health and the environment.
- The PLNGS's annual air emissions are higher than those from other CANDU nuclear reactors and significantly higher than other reactor types around the world.
- The PLGNS's maintenance backlog falls below standard for Canadian CANDU reactors.

Once again, we invite you to become standard bearers for authentic Indigenous engagement in a manner that intersects our mutual interests. Thus, granting a 3- year license should be paired with the dedication of time and resources to building a consequential collaborative relationship, taking hold of an opportunity to initiate a legacy of positive Indigenous relations which will be seen and felt on provincial, national, and international stages.

Recommendations from the Passamaquoddy Recognition Group Inc. Final summary from CMD22-H2-244 and supplemental documentation

April 27, 2022

Based upon:

- Legal obligations from the Crown to the Peskotomuhkati in the Peace and Friendship treaties;
- United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14) to advance the implementation of the UNDRIP, as a key step in renewing the Government of Canada's relationship with Indigenous peoples; and
- Government of Canada's commitment to fully implement the Calls to Action of the Truth and Reconciliation Commission

And, considering the evidence of indigenous knowledge, as presented in CMD22-H2-244, and its supplemental documentation, **we recommend (1)** that you, the Commissioners,

- reconsider if the impacts of the ongoing operations of PLNGS are acceptable, using the aforementioned legal obligations and commitments, as well as the metrics of:
  - who and what bears the brunt of continued impacts; and,
  - who and what gains benefit from PLNGS.

We recommend (2) you, the Commissioners, respect the ongoing development of nation-to-nation relations being undertaken by the government of Canada, and enable our vital need to enact our law (therefore fulfilling our role as caretakers of Peskotomuhkatikuk).

PLNGS was established in our territory without consultation or consent of the Peskotomuhkati, contrary to the terms of our Treaties. This remains an outstanding issue, **we recommend (3)** further attention and action regarding this issue prior to a relicensing decision being taken.

PLNGS continues to produce and store toxic waste in our ancestral homeland. This also remains an outstanding issue, **we recommend (4)** further attention and action regarding this issue prior to a relicensing decision being taken.

Finally, to date, the Nation has not been engaged by either NB Power or the CNSC on a nation-to-nation basis - this also remains an outstanding issue, **we recommend (5)** further attention and action regarding this issue prior to a relicensing decision being taken.

We recommend (6) that NB Power and CNSC support our assessment of their relevant policies:

- for substantive content, normative language, potential weaknesses, and possible impact on Peskotomuhkati treaty rights, title and interests;
- using UNDRIP as the minimum framework for the relationship between Indigenous peoples and the Canadian government and nuclear development decisions across Canada; and,
- against the rights, title and interests reconfirmed through Canadian and provincial courts.[17]

In particular, paying close attention to whether these policies, as well as CNSC's upcoming relicensing decision regarding PLNGS, SRWMF and the decommissioning plan and financial guarantee, have enough capacity to meaningfully contribute to the achievement of the items listed above.

We recommend (7) that prior to deciding on the NB Power application for relicensing and approval of the decommissioning plan and financial guarantee, you ensure collaboration with our Nation to the fullest extent possible and work in good faith to rectify our outstanding concerns.

Should you choose to approve a licence length over 3 years, we **recommend (8)** that your decision describes and details how you have applied consideration to:

- Peskotomuhkati Peace and Friendship Treaty Rights;
- the rights and interests and title of the Peskotomuhkati; and
- the principles of the United Nations Declaration on the Rights of Indigenous Peoples.

We recommend (9) that any decision about relicensing be delayed until you, the Commissioners, can direct due attention to the information presented by intervenors, respond on the record to our concerns and those of other

[17] For example, but not limited to the decision of Newfoundland Court of Appeal in Newfoundland and Labrador v. Labrador Métis Nation, 272 Nfld & PEIR 178; 288 DLR (4th) 641 (affirming a lower court decision at 258 Nfld & PEIR 257, [2006] 4 CNLR 94), Hopper v. R. (2008), 331 N.B.R. (2d) 177, R. v. Acker (2004), 281 N.B.R. (2d) 275, and R. v. Lavigne (2007), 319 N. B.R. (2d) 261.

intervenors, and allow intervenors the opportunity to discuss the CNSC staff responses on the record.

Process Recommendations

Further, we recommend (10) that the CNSC reform its relicensing process to allow staff and Commissioners to review and discuss evidence tendered by proponents and intervenors, at length with sufficient rigour and procedural safeguards in place so that CNSC's purpose of disseminating information to the public per section 9(b) of the NSCA and ensuring a licensing decision is arrived at in a fair and credible manner, can be fulfilled.

We recommend (11) that the CNSC reform its relicensing process is reformed to include a pre-hearing opportunity where staff, licensees and intervenors alike can weigh in on and determine the scope of the issues which should frame the licensing hearing and accompanying documents.

To enable efficient research and work by intervenors, and to ensure transparency, **we recommend (12)** that the CNSC reform its relicensing process to provide all documents referenced in the CMDs should be provided via a working hyperlink, rather than requiring intervenors to request documentation. Currently, much of the PFP funding is spent chasing documents. As well, to enable further efficiencies, we recommend the CNSC provide a document with naming conventions, or the use of meaningful document titles.

We recommend (13) that both the renewal of nuclear operating licences and any licences for small modular nuclear reactors on the Point Lepreau site, should be fully subject to the federal Impact Assessment Act so that considerations of the need and purpose of the project, as well as alternatives, could be fully assessed against a range of factors including accidents and malfunctions, cumulative effects, sustainability, identity factors and Indigenous knowledge and culture.

We recommend (14) that adequate resources to carry out meaningful responses, are negotiated, not unilaterally determined by CNSC staff.

Health and Environment Recommendations

We recommend (15) the measures proposed below be included as conditions of the license:

- ❖ continuous and stringent measures to monitor the impacts of each impingement and entrainment on the Bay of Fundy ecosystem. Specifically, we recommend that any license include conditions stipulating that the operator of the PLNGS take weekly samples of the water flowing into and through the plant to collect data on casualties of each impingement and entrainment. These samples should be analyzed for all organisms they contain, including but not limited to, fish, fish larvae, zooplankton, and phytoplankton. The results of this weekly sampling should be made available to the public on an ongoing basis as samples are analyzed.
- ❖ the keeping and public release of records of any fish or marine mammals that have been drawn into the forebay as well as reports of live releases back to the bay or mortalities. We suggest these reports be made public at least on a monthly basis.
- ❖ the development and analysis of a cumulative impacts study regarding both the terrestrial, freshwater and marine environments, providing data, and trend information as updates to the Marine Research Associates Ltd. late 1970s and early 1980s work, including but not limited to;
    - o *Baseline Data for Determining the Ecological Effects on the Marine Environment Related to the Operation of Point Lepreau Nuclear Generating Station*
    - o *Examination of Food Chains Leading to Major Marine Bird Populations at Point Lepreau, NB;* and

Review and integration of any missing recommendations from,

- o *'Recommendations for a Terrestrial and Freshwater Monitoring Regime for Point Lepreau, NB'*

Recommendations from Dr. Ian Fairlie

We recommend (16) strong consideration of expert Dr. Ian Fairlie's recommendations including:

16.1. Under the Precautionary Principle, it is recommended that no further license be issued for the Point Lepreau NPS
16.2. CNSC should apply the Ontario Government's ODWAC recommended maximum of 20 becquerels per litre (Bq/L) for drinking water

16.3. CNSC should recommend its own design guide for ground water of 100 Bq/L for tritium.

16.4. Urine tests and non-invasive bioassay tests should be carried out on volunteers from the community to ascertain local HTO and OBT levels.

16.5. Residents within 10 km of the plant should be advised to avoid consuming locally-grown foods including honey from hives, wild foods such as mushrooms and berries, and produce from their gardens.

16.6. In view of the discussion in Appendix C, local women intending to have a family, and families with babies and young children should consider moving elsewhere. It is recognised this recommendation may cause concern but it is better to be aware of the risks to babies and young children than remain ignorant of them.

16.7. NB Power employees, especially young workers and women workers, should be informed about the hazards of tritium.

Recommendations from Dr. Gordon Edwards

We recommend (17) strong consideration of our interpretations of expert Dr. Gordon Edward's work including;

17.1 Not accepting the high financial risk of the proposed financial guarantee, as it is directly to the health and safety of Canadians.

- "…it is a badly constructed assumption that decommissioned PLNGS hazardous waste will be accepted by other municipalities, provinces, or territories. In fact, the opposite has proven to be true in similar contexts. Accepting this strategy as sound at the planning stage would endanger the current and future residents surrounding PLNGS by subjecting them to false expectations of an end date to ongoing exposure to hazardous materials."

- ❖ "Due to inadequate resources, or inadequate advance preparation, or both, the decommissioning waste could remain on site in perpetuity, improperly stored … potentially a source of radioactive contamination for countless centuries thereafter."

17.2 We recommend "that the Commissioners refrain from granting a Power Reactor Operating Licence (PROL) for a period longer than three years, in part because of serious inadequacies in the proposed financial guarantee, but more importantly because the Commission needs more time to fulfill its fundamental responsibilities, as articulated in the Nuclear Safety and Control Act."

- ❖ "As previously remarked, there is no experience with the complete dismantling of a CANDU reactor, and so any cost estimates are necessarily speculative"
- ❖ "The bottom-line cost…translates to about $1.83 billion, expressed in 2022 Canadian currency. That's two and a half times larger than the financial guarantee that the Commissioners are being asked to approve in the present hearings."
- ❖ The Nuclear Energy Agency (NEA) of the OECD (to which Canada belongs) has published a large and detailed report entitled "Costs of Decommissioning Nuclear Power Plants" (2016, NEA No. 7201, NUCLEAR ENERGY AGENCY) Dr. Edwards points out that in the NEA report, the cost of "waste processing, storage and disposal" is a full 28 percent of the total decommissioning cost, whereas the Point Lepreau PDP assigns only 5.6 percent of overall cost to radioactive waste. That's exactly five times less than the percentage found by the Nuclear Energy Agency."

17.3 It is recommended that the Commissioners not accept the proposed financial guarantee for decommissioning PLNGS, or to make any such approval purely temporary and short-term, conditional on subsequent revisions to the amount proposed, based on demonstrable progress in locating a willing host community, and perceived shortcomings in the Preliminary Decommissioning Plan. Accordingly, PLNGS should not be granted a Power Reactor Operating Licence (PROL) for any period longer than three years.

17.4 Outside of Dr. Edward's independent work with our team, he is associated with the Canadian Coalition for Nuclear Responsibility (CCNR). We strongly

support the CCNR's 3rd recommendation in CMD22-H2-228 that that the Commission does not approve a PROL for Point Lepreau in excess of three years and during that 3 year time period the Commissioners task the CNSC staff to report to the Commissioners and public on the merits and demerits of the 18 safety enhancements suggested by Dr. Nijhawan in a presentation on October 1, 2018**. Even more timely and critical, however, is the CCNR's recommendation 4, in their supplementary documentation for Hearing 2022-H-02, which is that the Commission does not approve a Power Reactor Operating Licence (PROL) for Point Lepreau unless and until fully adequate pressure relief valves are installed in the primary heat transport system – valves that are in complete accordance with ASME recommendations.**

- ❖ See CCNR Supplemental Documentation related to CMD22-H2-228 It has become clear that the Point Lepreau reactor is not equipped with an adequate pressure relief system in the event of a severe overpresssurization of the primary heat transport system (HTS). In other words, a reactor accident that causes sustained overpressurization of the HTS will lead to a rupture in the primary heat transport system due to the plant's inability to relieve that pressure. Such a rupture will make it impossible to remove the radioactive decay heat rapidly enough to prevent severe core damage, resulting in massive radioactive releases into the reactor building – through the rupture – and likely into the environment.

Recommendations from CRED NB/CELA

We recommend (18) strong consideration of the recommendations included within the CRED NB/CELA intervention CMD22-H2-194, with specific interest drawn to recommendations 1- 29, 31, 32, 34, 37 and 40, reprinted here for convenience.

18.1 (SIMILAR TO OUR RECOMMENDATION 11) The CNCS should provide a pre-hearing opportunity where CNSC Staff, licensees and intervenors alike can weigh in on the issues which should frame the licensing hearing and accompanying documents. Given the trend to longer licences, soliciting public comment on the scope of issues which they believe are critical, would provide a starting point for early public engagement.

18.2 (SIMILAR TO OUR RECOMMENDATION 12) Documents relied upon in NB Power's and CNSC Staff's CMDs ought to be publicly available by default and not available upon request only.

18.3 At a minimum, the CNSC should require all licensing documents be publicly disclosed to advance the public's right to know. This is critical, not only in advancing the right to know, but the public's trust in the regulator and the actions of the licensee.

18.4 The CNSC should immediately initiate a comprehensive review of action items made in previous licensing hearings, to ensure past commitments are Upheld and tracked for compliance.

18.5 (SIMILAR TO OUR RECOMMENDATION 12) References contained in CNSC staff's and the licensee's CMDs ought to be publicly available so that subject matter experts can provide peer review of the documents. This is necessary for the CNSC is to uphold its obligations to disseminate "objective" information.

18.6 The right to cross-examination must be adopted as part of the hearing process so that members of the public have the ability to pose questions regarding, for instance, a study's methods, scope and findings.

18.7 (SIMILAR TO OUR RECOMMENDATION 13) The renewal of nuclear operating licences should be fully subject to the federal Impact Assessment Act so that considerations of the need and purpose of the project, as well as alternatives, could be fully assessed against a range of factors including accidents and malfunctions, cumulative effects, sustainability, identity factors and Indigenous knowledge and culture.

18.8 Licence renewals should be subject to shorter licensing terms as it provides the opportunity for public hearings under section 40(1) of the NSCA, and enhances the openness and transparency of the CNSC, and its oversight of nuclear uses and technologies. These opportunities are critical to building the public's trust in the regulator and would be lost if there is only one chance every generation for the public to participate in a hearing and engage in dialogue with the CNSC and the licencee about their concerns.

18.9 Regulatory Oversight Reports and meetings are not sufficient alternatives to licensing hearings given their limited scope and exclusion of oral intervention

opportunities. They should not be relied upon to remedy outstanding issues resulting from licensing hearings, nor used as a stand-in for public hearings.

18.10 The CNSC should disregard CNSC staff's recommendation for a 20-year licencing term.

18.11 Without a more thorough review of legislation and licencing procedures in other jurisdictions, international precedence and benchmarking do not justify longer term licences in Canada.

18.12 The CNSC should direct CNSC Staff and NB Power to revise all licensing documents to avoid implying 'no change' will occur at the Point Lepreau site during the proposed licensing term.

18.13 As a condition of licensing, upon receipt of an application to construct or site an SMR at Point Lepreau, a public hearing for NB Power's operating licence shall occur pursuant to section 40(5)(b)151 of the NSCA, and both licences at the Point Lepreau site considered in tandem, so that a site-wide and comprehensive review of cumulative effects, emergency planning, and impacts from accidents and malfunctions can be carried out.

18.14 In the event of a change in ownership or transference of the licence during the licensing term, a public hearing should be held pursuant to section 40(5)(b) of the NSCA.

18.15 NB Power should be required to forecast environmental impacts for years 1 – 25 of the proposed licence period.

18.16 NB Power should be required to consider impacts to physical, biological, and human (including social, health and cultural) environments.

18.17 Given the unprecedented request for a 25-year licence, the ERA should be updated with data from 2019 and 2020, and, if possible, with data from 2021, before the Commission makes any decision regarding the requested licence renewal.

18.18 NB Power should be required to predict or evaluate potential changes to the environment and likely effects in the subsequent 25-year licensing period.

18.19 The CNSC should make it a condition of licencing that all emissions monitoring data be publicly reported in real time.

18.20 The gap caused by the historical oversight of decommissioning considerations and the infancy of the CNSC's consideration of decommissioning strategies more broadly in Canada, means this licensing hearing ought to be used as an early engagement opportunity to review decommissioning plans, methods, and their accompanying impacts to human health and the environment.

18.21 Review of NB Power's proposed decommissioning strategy ought to be among the issues considered in Part 2 of the licence renewal hearing. Supplemental submissions should be provided by the licensee so that both the Commission members and the public can engage in a review of preliminary plans and strategies.

18.22 The CNSC ought to review NB Power's proposed decommissioning strategy in light of plans for SMRs at the site.

18.23 The CNSC should review the licence renewal application with express consideration given to climate impacts and climate resiliency, including in the context of site suitability and impacts on safety and the environment.

18.24 The criteria by which climate change impacts and natural external events have been assessed and evaluated against the 25-year licence application must be clearly set out.

18.25 Detailed climate analysis must be presented in a public forum as part of the CNSC's licensing process.

18.26 NB Power's environmental impact studies, evacuation time estimates, and land use change studies should be modelled at least 25 years out.

18.27 To conform with international guidance, the Ingestion Pathway Zone must be expanded from 57 km to 300 km and include the additional requirement that all municipalities within this zone maintain nuclear emergency response plans.

18.28 Models of potential exposure pathways must be a requirement of emergency response planning and a prerequisite to any determination on the sufficiency of off-site preparedness. If such modelling has already been

Conducted, then the assessments should be publicly disclosed prior to Part 2 of the hearing.

18.29 We encourage the CNSC to require NB Power to provide KI by way of pre-distribution within a 50 km radius, and pre-stock to 100 km. In accordance with international best practice, the CNSC should extend KI stockpiles to 100 km and ensure that places frequented by vulnerable groups, such as children and pregnant women, maintain sufficient stockpiles.

18.31 Licence Conditions Handbook section 10.1 be updated to read the "licensee must provide emergency communications" and not "should", as currently drafted.

18.32 The CNSC should require ongoing public education for emergency preparedness and protective actions.

18.34 Require NB EMO to update its Emergency Plan to include information on how land use changes will be tracked and reported to the CNSC to ensure the sufficiency of emergency planning.

18.37: A licence should not be granted until a marine-based offsite emergency plan is made public. The CNSC must ensure emergency *CRED-NB and CELA Intervention* – 54, response at sea allows for an effective response to accidents and demonstrates a high level of preparedness.

18.40 Given the speed of evolving cyber security threats and uncertainty of risks, the CNSC should not grant NB Power the 25-year licence extension as applied for.

Recommendations arising from PRGI's Supplemental submission

NB Power and CNSC assessments of the effects of hazards relative to PLNGS focus on the analysis of biologic, chemical, and physical data. These routine assessments are used as a foundation for decision making and risk management.

We must therefore **recommend (19)** that the impacts of PLNGS and its toxic, long-lived waste is assessed in a holistic manner (using approaches led by us and aligned with our culture and methods of knowing), to integrate co-produced

evaluations of essential human factors – the social, cultural, and spiritual values, beliefs, and practices that link us to our environment.

How can anyone classify a waste product which will contaminate this planet for thousands of years as anything but a hazard and a risk to “health, safety and security”?

Hugh M. Akagi
Chief of Passamaquoddy Peoples

Appendix A

HANDLING USED NUCLEAR FUEL

Prepared by Gordon Edwards (Ph.D.)

at the request of the Passamaquoddy Recognition Group Inc.

Contact: Kim Reeder 506-467-1927

April 27, 2022

This supplementary report was prepared by Gordon Edwards at the request of the Passamaquoddy Recognition Group Incorporated (PRGI), to complement Edwards' earlier report dated March 16, 2022, entitled *Paying for Radioactive Rubble – is the financial guarantee enough?*

The earlier report argued that the Commissioners should not grant a lengthy operating license – nothing more than three years – on the basis that the financial guarantee currently proposed for decommissioning the plant is unlikely to be sufficient to cover the full costs of decommissioning at the end of its lifetime. The argument was based on a comparison with decommissioning cost estimates from OECD's Nuclear Energy Agency, reinforced by the past history of cost overruns at Point Lepreau, from construction to refurbishment, as well as past experiences in Ontario demonstrating the costliness and political difficulty of trying to find a willing host community to accept radioactive wastes from outside the community.

This supplementary report reiterates that position, while adding additional reasons for the Commissioners not to grant a lengthy operating license. The Moltex corporation, supported by both the provincial and the federal governments, and allied with SNC-Lavalin, to access the used fuel stored at Point Lepreau for the purpose of extracting plutonium. This raises many new questions relevant to the operating licence for Point Lepreau NGS that are of great importance to Indigenous peoples and other residents of New Brunswick.

1. Financial Guarantee for Decommissioning

If the financial guarantee for PLNGS is inadequate, there is a real danger that the radioactive and non-radioactive wastes from the decommissioning and the refurbishment of the reactor may remain on site for a very long time, if not in perpetuity, due to lack of funds. For this reason, if the Commissioners were to approve an inadequate financial guarantee, it could have serious repercussions for the Indigenous people on whose unceded territory the Point Lepreau Nuclear Generating Station was originally built. That land was used without approval or even adequate consultation with the affected Indigenous communities. If the land is ever to be returned to its Indigenous custodians, it should be done so with no permanent radioactive legacy left behind.

While it is beyond the authority of the Commissioners to decide such things, it seems clear that they can act responsibly by ensuring, to the best of their ability, that the financial guarantee is adequate to pay for the removal of all the radioactive contamination from the territory in question, probably to some other site in the province of New Brunswick.

Recommendation

It is recommended that the Commissioners not accept the proposed financial guarantee for decommissioning PLNGS, or to make any such approval purely temporary and short-term, conditional on subsequent revisions to the amount proposed, based on demonstrable progress in locating a willing host community, and perceived shortcomings in the Preliminary Decommissioning Plan. Accordingly, PLNGS should not be granted a Power Reactor Operating Licence (PROL) for any period longer than three years.

2. Accessing and Reprocessing Used Fuel

The federal and provincial governments have both invested in the Moltex molten salt reactor, which is designed to use plutonium extracted from used CANDU fuel currently stored at Point Lepreau. Of course, when the time comes Moltex will have to be licensed by CNSC.

However, unlike most Power Reactor Operating Licences, this one would involve three facilities at the same time – (1) used CANDU fuel bundles from Lepreau would have to be accessed and prepared for pyroprocessing; (2) an electro-metallurgical reprocessing plant would be needed to extract plutonium, minor actinides, and lanthanides (from the CANDU used fuel) to be used as fuel in the Moltex reactor, leaving behind waste streams of unfissioned uranium and fission products; (3) the Moltex reactor itself, with liquid plutonium-actinides-lanthanides as fuel, and molten salt as a coolant.

Edwin Lyman is the author of a publication by the Union of Concerned Scientists entitled, *"Advanced isn't always Better, Assessing the Safety, Security, and Environmental Impacts of Non-Light-Water Nuclear Reactors"* (UCS, March 23, 2021)[18]. In a video presentation[19] on April 29, 2022, Dr. Lyman estimated that about 750 tonnes of CANDU used fuel would have to

[18] Edwin Lyman, "Advanced" Isn't Always Better: Assessing the Safety, Security, and Environmental Impacts of Non-Light-Water Nuclear Reactors. UCS, March 18, 2021. https://www.ucsusa.org/resources/advanced-isnt-always-better

[19] Edwin Lyman, webinar "The Bay of Fundy: Natural Wonder or Nuclear Test Site? (Part 2)". NB Media Co-op, April 29, 2021. https://nbmediacoop.org/2021/04/28/the-bay-of-fundy-natural-wonder-or-nuclear-industry-test-site-video/

be processed to produce enough fuel for one Moltex 300 MWe SSR reactor. That's about 39,000 fuel bundles, each containing roughly 0.4 percent of plutonium and minor actinides, leaving behind over 745 tonnes of radioactive waste, in the form of a small volume of highly radioactive fission product salts and a larger volume of contaminated uranium salts. Accessing 39,000 used fuel bundles from existing dry storage containers and/or from the Point Lepreau spent fuel bay will evidently complicate the management of used nuclear fuel at Point Lepreau and create new possibilities of radioactive releases, worker exposures and residual waste management issues. Since all of this irradiated fuel handling is intended to occur well before 20 years have passed, it is not advisable for CNSC to grant an overly long licence for PLNGS. If a Power Reactor Operating Licence is limited to a much shorter time period, the CNSC will be in a better position to have the licensee address a number of important questions in anticipation of the Moltex proposal, such as:

• how will the PLNGS team access and deliver the required tens of thousands of used fuel bundles to Moltex for pyroprocessing?

• what radioactive releases to the environment could occur under normal and accidental conditions during the associated used fuel handling?

• what occupational exposures may occur under normal and accidental conditions during the associated used fuel handling?

• what is the potential for worker contamination with alpha-emitting or beta-emitting particulates as a result of the associated used fuel handling?

• what kind of additional security protocols will be required as a result of the associated used fuel handling, given existing IAEA requirements?

• who will own the various waste streams after the used fuel is transferred to Moltex and pyroprocessed to extract the very small volume of material (less than 1/2 of one percent) needed as Moltex fuel?

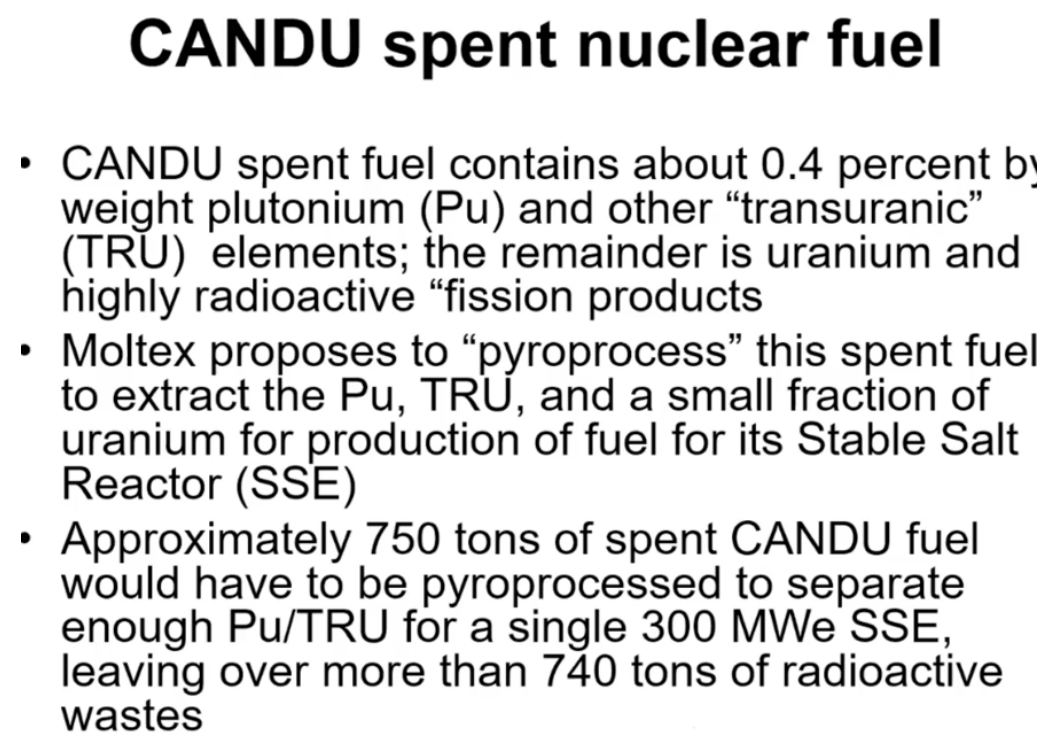
• how will the proposed pyroprocessing operation affect the legal and fiscal responsibility of Point Lepreau vis-à-vis the long-term management of its used nuclear fuel?

Along with other issues such as unresolved reactor safety issues, inadequacies in emergency planning, unresolved decommissioning issues, and the insufficiency of the financial guarantee for decommissioning (including the long-term management of decommissioning wastes), these question (summarized above) related to the proposed future reprocessing of used CANDU fuel stored at the Point Lepreau reactor site, mitigate against the Commissioners granting a decades-long operating license for the Point Lepreau NGS.

There are too many questions that need to be answered before the Point Lepreau nuclear generating station nears the end of its operating lifetime to allow for a decades-long period without any public hearings. There are issues affecting Indigenous land claims, the safety and security of used nuclear fuel handling, the financing and thoroughness of eventual reactor decommissioning activities, the necessity to guarantee adequate funds for decommissioning while the reactor is still generating revenues that can be allocated for that purpose, and the need to maintain a public process of openness, transparency and accountability to Indigenous peoples and

other Canadians for whose benefit the CNSC was created under the terms of the Nuclear Safety and Control Act.

Exhibit –from Edwin Lyman's webinar on April 29, 2022.



Appendix B

Making the Canadian Federation Complete

Ian Peach, 2018

Making the Canadian Federation Complete

Ian Peach

For 150 years, the Canadian Confederation project has been incomplete, as the Indigenous nations who occupied this territory before the European colonizers arrived, and who retained their sovereignty as allies of the colonizers, have never been included in the Canada's federal system of governance. Instead, they have been treated as "wards" of the federal government, a government that, despite its fiduciary duty to protect their interests, has left far too many Indigenous people poor, undereducated, unhealthy, underemployed, and overrepresented in our prisons until they die, prematurely and too often by their own hands.

As Brown notes in his article in this volume, the Canadian federation today provides Indigenous peoples with two tracks to improve their well-being and realize their place in Canada – a public policy track and a legal/rights track (Brown 2018); unfortunately, both tracks leave them in the role of supplicant, effectively asking of Canada's continuing colonial power structures, "Please, sir, may I have some more?" Probably the last time the public policy track has spoken to Indigenous peoples honestly was when Pierre Trudeau's government published its White Paper, "Statement of the Government of Canada on Indian Policy" in 1969 (Minister of Indian Affairs and Northern Development 1969). Since the visceral negative reaction to the proposal to eliminate "Indian" status and the inherent rights of Indigenous peoples, public policy on Indigenous issues has been marked by generous words but very little action to include Indigenous peoples in Canadian government and society or improve their well-being.

Going to court to act on the legal/rights track has, therefore, seemingly been the only route available to stimulate action but it, too, has been a less than satisfying track. Canadian courts have proven to be fickle allies of Indigenous peoples. The Supreme Court of Canada has compared Indigenous sovereignty favourably to settler-state sovereignty, in *Haida Nation* v. *British Columbia* (Minister of Forests), where the Court stated that "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty…" (*Haida Nation* v. *British Columbia* (Minister of Forests) 2004: para 20). The Supreme Court also decided, in its 2014 decision in *Tsilhqot'in Nation* v. *British Columbia*, that Aboriginal peoples retain title over traditional territories that they did not cede to the Crown (*Tshilhqot'in Nation* v. *British Columbia* 2014: especially at paras 18, 42, 50, 66). In that same decision, though, the Court decided that, despite the fact that Aboriginal title "confers the right to use and control the land and to reap the benefits flowing from it" onto the Aboriginal titleholders, incursions onto Aboriginal title lands can be justified "by a compelling and substantial public purpose … not inconsistent with the Crown's fiduciary duty to the Aboriginal group…" (*Ibid*.: para 2). Somehow, the assumed sovereignty of the Crown gives the Crown underlying title, superior to

Aboriginal title, to lands that were never ceded to the Crown by the Indigenous peoples who had pre-existing sovereignty over those lands. As well, the Court also decided, quoting its decision in *Delgamuukw*, that "compelling and substantial" public purposes that can, in principle, justify incursions onto Aboriginal title lands with the consent of the Aboriginal titleholder including "the development of agriculture, forestry, mining, and hydroelectric power, … general economic development …, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims...," in other words virtually any activity settler society and its government wishes to pursue (*Ibid*.: para 83).

The Supreme Court of Canada decision in *Mitchell* v. *Minister of National Revenue* is a prime example of how fickle Canadian courts have been as allies of Indigenous peoples. Justice Binnie, in his concurring judgement, seems sympathetic to the perspectives of the Mohawks of Akwesasne and the history of Crown-Indigenous relations in eastern North America, extensively discussing the early Peace and Friendship Treaties, the two-row wampum, and the idea that the treaty partnership led to the development of a concept of shared sovereignty, which we might describe as co-sovereignty (*Mitchell* v. *Minister of National Revenue* 2001: paras 127-29). He even goes so far as to state that "If the principle of 'merged sovereignty' articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort" (*Ibid*.: para 129). He goes on to comment that:

> *The final Report of the Royal Commission on Aboriginal Peoples, vol. 2, goes on to describe 'shared' sovereignty at p. 240-41 as follows: "Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation"*

and,

> *So too in the Court's definition of aboriginal rights. They find their source in an earlier age, but they have not been frozen in time. They are, as has been said, rights not relics. They are projected into modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish to preserve and protect their aboriginal identity* (*Ibid*.: paras 130, 132).

This sounds like a promising development for Indigenous peoples; Justice Binnie concludes, however, in concurring with the majority of the Court, that "In my view, therefore, the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty. … In my respectful view the claimed aboriginal right never came into existence…" (*Ibid*.: paras 162, 173). Decisions such as *Mitchell*, *Delgamuukw*, and *Tsilhqot'in Nation* certainly do not hold out promise of the courts being a consistent ally of Indigenous peoples

seeking to protect their pre-existing sovereignty and the rights that pre-existing sovereignty creates. Even if the courts were a consistent ally of Indigenous peoples, though, securing recognition of Indigenous sovereignty through the courts is a slow, incremental process; serious action requires political will.

Indigenous nations were sovereign nations at the time of European contact; the "rights" that the Canadian Constitution recognizes that Indigenous peoples have today exist not because Indigenous peoples merely resided on this territory first, but because they were organized, sovereign nations before Europeans ever arrived in North America. The sovereignty of Indigenous nations was confirmed through the negotiation of treaties between Indigenous nations and the British Crown. As John Borrows comments, one of the best examples of the governance powers of Indigenous peoples is their power to make treaties with the Crown, over 350 of which were made prior to Confederation (Borrows 2005: 296). The treaties, such as the Peace and Friendship Treaties in the Maritimes, manifestly considered Indigenous nations as distinct political communities with territorial boundaries within which their authority was exclusive, so that they and European settler nations acted as equal nations, each with their own forms of government, traditions, and ways of living, that agreed to cooperate in various ways through treaty commitments, very much in the tradition of treaty-making among European powers (Tully 1995: 124). As Supreme Court of Canada Justice Antonio Lamer noted in *R.* v. *Sioui*, the Crown treated Indian nations with generosity and respect out of fear that the safety and development of British colonies would otherwise be compromised (Slatterly 2008: 26). Once this form of mutual recognition was worked out, the only way the Crown could acquire land and establish sovereignty in North America was to gain the consent of the Indigenous nations.[1]

Today, the UN Declaration on the Rights of Indigenous Peoples provides additional stimulus for the recognition of Indigenous sovereignty, by declaring that Indigenous Peoples have the right to self-determination, to freely determine their political status, to distinct political, legal, economic, social, and cultural institutions, and to freely pursue their social, economic, and cultural development; in other words, as Brown describes it, Indigenous peoples in Canada have the right to be "co-sovereign" with Canada (United Nations 2008: articles 3-5, 20; Brown 2018). Sovereigns, however, do not ask to be allowed to exercise their sovereignty; sovereigns are not supplicants. If Indigenous peoples wait for permission from settler-state institutions to become co-sovereign with them, Canadian history has demonstrated that the permission will never be forthcoming as it will always be deemed "too disruptive". To become co-sovereign, Indigenous peoples will have to actually exercise their sovereignty, even if state institutions deem such actions to be "civil disobedience," and reset the power relations within the state.[2]

[1] While the Wabanaki nations, through the Peace and Friendship Treaties, accepted British occupation of lands already occupied by British settlers, in exchange, the British agreed that settlers could take up no new lands other than through securing Indigenous nations' consent. This is consistent with treaty-making generally, where the realities at the time of treaty-making are accepted but, to bring an end to conflict, agreed-upon arrangements are made to provide rules for the management of the parties' future relationship.

[2] Several incidents of this sort have occurred through recent Canadian history; likely the best-known is the conflict at Oka/Kahnesatake, Quebec in 1990, but there have also been other conflicts, such as in Burnt Church/ Esgenoôpetitj,

Such actions by Indigenous peoples to exercise their sovereignty, though, would be nothing more than a strategy to reset the relationship with the Canadian state. Such actions could encourage the Prime Minister to recognize Indigenous peoples as co-sovereigns in the Canadian political space, ask Indigenous peoples for their agreement to be partners in governing the Canadian political space, and commit to equipping them to fully exercise that sovereignty, as Brown hopes would occur (Brown 2018). The purpose of recognizing Indigenous sovereignty, as Kerry Wilkins describes it, is to dedicate "sufficient constitutional space for Aboriginal peoples to be Aboriginal;" this entails respecting and protecting the power of Indigenous communities to address their own needs and imperatives in ways they consider effective and appropriate, even when their aims and ways differ substantially from what settler society might have done or preferred (Wilkins 2007: 251). As Wilkins notes, for Indigenous communities, the acknowledgement that they have the enforceable right to govern themselves may be the minimum price that the mainstream legal system must pay to earn a modicum of respect from them (Ibid.: 250).

Making the practical, functional arrangements necessary to make co-sovereignty operate in the real world of Canadian governance, though, will require Indigenous nations and the Crown, in both its federal and provincial/territorial dimensions, to establish an ongoing relationship and negotiate the arrangements that will allow both sovereign orders of government to work together to share their sovereignty. Luckily, we in Canada have a great deal of experience and expertise in managing shared sovereignty, from our 150 years as a federation under the *Constitution Act, 1867*. If we see the question of how to create a space for co-sovereign Indigenous nations to be self-governing within a shared constitutional order today as, essentially, a question of federal governance that builds on these long-standing traditions of mutually recognized and shared sovereignty between distinct political communities within Canada, we have a vast wealth of political practice and jurisprudence to draw on. One important Supreme Court of Canada decision that can serve to guide us in imagining what is possible in providing Indigenous peoples with the space to be self-determining within the Canadian constitutional order is the *Reference re. Secession of Quebec* (Quebec Secession Reference 1998).

In the *Quebec Secession Reference*, the Supreme Court identified four underlying, unwritten, but fundamental principles of the Constitution: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. If one understands these four principles as fundamental to the Canadian constitutional order, applicable to the task of integrating the sub-state national minorities that are an integral part of Canada into a shared constitutional order in a just manner, it becomes possible to bring the entirety of our experience with federalism, democracy, constitutionalism and the rule of law, and the protection of minorities to bear on the question of advancing Indigenous self-government (Peach 2009: 33). As well, if we understand the reconciliation of the pre-existing sovereignty of Indigenous peoples and the *ex poste* asserted sovereignty of the Crown to be another fundamental principle

New Brunswick between 1999 and 2002 and more recently at Elsipogtog First Nation near Rexton, New Brunswick in 2014. There may also emerge a similar conflict this year, as a group of Wulustukyik women have established a campsite at the site of the planned Sisson Brook mine in New Brunswick to defend the Wulustukyik Nation's Aboriginal title to the territory; while this occupation has not yet led to a conflict like those in Oka, Burnt Church, or Elsipogtog, the possibility exists that it may, once spring comes.

of our constitutional order (as opposed to merely reconciling Indigenous peoples to the reality of Crown sovereignty, as the Supreme Court of Canada has defined reconciliation in a number of cases other than *Haida Nation*),[3] the fundamental principles articulated by the Supreme Court in the *Quebec Secession Reference* must, themselves, be interpreted in a way that serves to reconcile Indigenous and Canadian co-sovereignty (*Ibid*.). If interpreted in this context, the four unwritten principles which the Supreme Court of Canada identified in the *Quebec Secession Reference* do not represent a barrier to the exercise of Indigenous sovereignty. Indeed, the principles of federalism and the protection of minorities support the protection of distinct Indigenous political and legal institutions.

As the Supreme Court of Canada described federalism in the *Quebec Secession Reference,*

> *The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity* (Quebec Secession Reference 1998: para 58).

In many ways, this principle is the most important one for understanding how to integrate Indigenous sovereignty into Canada's structure of governance. It is federalism, at least in its Canadian form, that provides the space for sub-state national minorities to exercise the right to internal self-determination within the multinational state and that allows for the reconciliation of otherwise competing sovereignties within a shared political and geographic space. The federal principle, whose purpose is to manage conflicting claims to authority, is therefore a highly appropriate ground on which to structure Indigenous/non-Indigenous relationships. The value of the sovereignty secured through federalism is that it creates legal space in which a community can negotiate, construct and protect a collective identity and express a collective difference through democratic means. Sovereignty in this model is not absolute, but a self-determining Indigenous nation would have powers related to its needs as a distinct community, which could include control over economic, social, cultural, and linguistic matters, as well as internal political autonomy (Bryant 1992: 293-94). Federalism is also familiar to Indigenous peoples as a means to divide sovereignty. One need only look, for example, to the Wabanaki Confederacy in what is now the Maritime provinces and the US Northeastern-most states. Horatio Hale, in his book *The Iroquois Book of Rites*, notes that few, if any, Indigenous nations had not at some time or other been part of a confederacy, such that it could almost be described as "their normal condition" (Hale 1883: 21).

Federalism is not, however, simply separation. There is a tradition in Canadian federalism that explicitly connects federalism and fraternity. As La Selva notes, Henri Bourassa described the French and the English as separated by language and religion, but united in a sense of

[3] See, for example, *Delgamuukw* v. *British Columbia*, [1997] 3 SCR 1010 (*Delgamuukw*).

brotherhood (La Selva 1996: 26). As we understand it, this is akin to the Indigenous understanding of the relationship established between Indigenous peoples and the Crown in the period of treaty-making; thus, Indigenous peoples' demand for self-government can be seen as a demand that the ideal of fraternity apply to them as well, to replace a relationship of supplicant and sovereign (*Ibid*.: 29). The paradox in Indigenous demands for self-government is that theirs is likely the strongest claim to sovereignty of any sub-national community in Canada, yet the realization of Indigenous self-determination as co-sovereigns in this shared geographic space presupposes the continuing political interdependence of Indigenous and non-Indigenous Canadians; if this paradox is accepted, though, Indigenous self-government becomes a part of the way in which the multiple dimensions of the existence of Indigenous peoples as sovereign nations contribute to a dialogue of democracy in Canada (*Ibid*.: 11).

This understanding of Indigenous self-determination as an exercise of sovereignty within a space of shared co-sovereignty compels us to recognize not only a sphere of autonomous self-government authority but also, as Murphy describes it, the need for sites of governance capable of managing the relationships among self-governing peoples living in situations of complex interdependence (Murphy 2008: 199). For his part, Jean Leclair advocates something he calls "federal constitutionalism," which would provide for the recognition of Indigenous peoples as constituent peoples within a truly federal constitutional framework that would be capable of being sanctioned by a domestic court of law Leclair 2006: 529). The aim of such forms of constitutional interpretation or constitutional negotiation is not to reach agreement on a set of universal principles and institutions, but to establish a diverse federation which recognizes and accommodates cultural, political, legal and institutional differences through appropriate forms and degrees of self-rule or sovereignty, while providing shared institutions to govern where the different communities have shared interests (Tully 1995: 131). The Canadian approach to federalism, as a matter of both politics and law, already supplies the framework and principled justification for Indigenous peoples to exercise their right to self-determination as an internally sovereign order of government without interference from governments that are not creatures of those peoples in matters of particular interest to those Indigenous peoples.

On the second principle we have identified as key to understanding how to realize and operationalize the sovereignty of Indigenous nations within the Canadian political and constitutional space, that of the protection of minorities. The Supreme Court of Canada noted that there are a number of constitutional provisions to protect minority language, religious and education rights and said that, "the protection of minority rights is itself an independent principle underlying our constitutional order" (Quebec Secession Reference 1998: para 80). The Court then went on to note that,

> *it should not be forgotten that the protection of minority rights had a long history … Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation. … The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution* (*Ibid*.: para 81).

In the context of their discussion of this principle, the Court also stated that,

> *Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the* Constitution Act, 1982 *included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. … The protection of these rights, … whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value* (*Ibid*.: para 82).

Since Indigenous peoples are minorities, respecting their collective interests and their collective right to self-determination is, itself, a requirement of the constitutional principle of the protection of minorities. Insofar as self-government for national minorities, such as Indigenous peoples, helps to secure access to a societal culture, it can contribute to individual freedom; the failure to recognize their sovereignty will result in further tragic cases of Indigenous peoples being denied the protection of the cultural context within which individual choices are meaningful and support individual autonomy and self-determination (Kymlicka 1995: 37).

Indigenous systems of law and governance may well look different from Euro-Canadian systems, but that fact alone does not make them incompatible with our constitutional order (Peach 2009: 88). Sovereignty is the right of a nation to structure itself and act as it sees fit, at least within the confines of that which is acceptable to the shared political practice and fundamental law of the shared political and legal community within which it functions. As long as Indigenous systems are democratically legitimate, legal, in the sense of being based on rules that are applicable to all members of society, and respect and protect the equality of men and women and the legitimate interests of minorities within their nations, as well as providing space for the exercise of the sovereignty and right to self-determination of those nations, as national minorities, within the federation, Indigenous systems will be consistent with our fundamental constitutional order (*Ibid*.: 88-89).

We have sought to set out an approach to Indigenous self-government that would be better grounded in the historical Indigenous-Crown relationship in Canada and the continuing requirement that the Crown act honourably in its modern relationship with Indigenous peoples. It takes as its premise the Supreme Court of Canada's challenge to reconcile the continuing sovereignty of Indigenous peoples with the asserted sovereignty of the Crown. An understanding of the Constitution of Canada as an "ancient constitution", or a common-law constitution, admits of no other result than the recognition that the Indigenous peoples of Canada have never abandoned their sovereignty, their right and responsibility to be self-determining; the most effective way to give practical meaning to this understanding in a modern context is by providing Indigenous nations with sufficient constitutional space to exercise their continuing sovereignty on matters that affect Indigenous peoples' ability to secure their status as culturally distinct national minorities within Canada (*Ibid*.: 159). Indigenous self-government would thus genuinely become a part of the Canadian federal system, with Indigenous governments sovereign within their spheres of jurisdiction, but integrated into the Canadian system of governance through a genuinely shared constitutional order. We are all here to stay, as Chief Justice Antonio Lamer

commented in *Delgamuukw* (*Delgamuukw v. British Columbia* 1997*:* para 186), so we should seek an honourable way to secure the reconciliation of the two sovereignties that exist within this shared geographic and political space within the constitutional apparatus of the Canadian state (Peach 2009: 164). If settler-state governments were to develop policies to recognize and help realize Indigenous self-government that were consistent with the two fundamental constitutional principles of federalism and the protection of minorities, as interpreted through the lens of the other fundamental constitutional principle that must be respected in the Crown's relationship with Indigenous peoples, that of reconciliation, it is possible to imagine that finally today, over 150 years after the creation of the federation of the British North American colonies began, the Canadian federation could finally begin the process of becoming complete.

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