



**Written submission from
Alderville First Nation**

**Mémoire de la Première Nation
Alderville**

In the Matter of the

À l'égard d'

Ontario Power Generation Inc.

Ontario Power Generation Inc.

Application for a licence to construct one BWRX-300 reactor at the Darlington New Nuclear Project Site (DNNP)

Demande visant à construire 1 réacteur BWRX-300 sur le site du projet de nouvelle centrale nucléaire de Darlington (PNCND)

**Commission Public Hearing
Part-2**

**Audience publique de la Commission
Partie-2**

January 8, 2024

8 janvier 2024



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ALDERVILLE FIRST NATION

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Chief: Taynar Simpson
Councillor: Dawn Marie Kelly
Councillor: Lisa McDonald
Councillor: Nora Sawyer
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Alderville First Nation's ("AFN") submission on the Canadian Nuclear Safety Commission ("CNSC") consultation process for the Darlington New Nuclear Project ("DNNP") Licence to Construct ("LTC") application for participation as an Intervenor in the Hearing Part 2.

Who We Are

AFN is a thriving community that is rich in heritage and native culture. We are located in South-Central Ontario, Canada. Alderville is intersected by County Road 45, and is located on the south side of Rice Lake, Ontario, approximately 30km north of Cobourg. Alderville has been home to the Mississauga Anishinaabeg of the Ojibway Nation since the mid-1830s. Before that time the people lived in their traditional lands around Bay of Quinte (Grape Island) but with the influx of refugee settlement after the American Revolution their existence found itself under increased pressure.

AFN is a cultural partner of the Michi Saagiig (Mississauga) Nation, with traditional territories expanding through most of southeastern Ontario, including lakebeds, tributaries, and watersheds. AFN is signatory to the Williams Treaties of 1923, which after 90 years of dispute came to a final settlement agreement in 2018 which reaffirmed our pre-confederation treaty rights to harvest.

The courts recognize that Indigenous communities have constraints which can lead to inadequate opportunities for them to meaningfully participate in consultation.¹ These constraints include, but are not limited to, personnel capacity, funding capacity, and internal governance structures that move at a different pace than federal or provincial teams.

Personnel Capacity

Indigenous communities' consultation requests are overwhelming. A proponent or government department may be tasked to work on one particular project, such as the CNSC, but AFN will be simultaneously dealing with multiple projects. Creating a consultation team to help the Nation is ideal however this takes a considerable amount of time, energy and funding. Still, Nations with consultation teams also face an overwhelming number of requests. When the consultation demands on AFN outstrips our capacity, we are forced to decide on the priority of our attention. This will sometimes force us to choose governing our community instead of engaging in consultation to the extent we believe is required to make it meaningful.

Funding Capacity

Sometimes the consultation requirements are of a complex matter that requires specialized knowledge. Sometimes the consultation is of such importance that legal counsel is required. Paying

¹ *Moulton Contracting Ltd v British Columbia*, [2013 BCSC 2348](#) at para 293; *Xeni Gwet'in First Nations v British Columbia*, [2007 BCSC 1700](#) at para 1138.

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our consultation personnel, experts in a particular field, and legal counsel is very expensive. When capacity funding is available, applying for it adds to our workload and is often a barrier to overcome.

While the courts have not made consultation funding a legal requirement, the Crown's failure to provide capacity funding has led courts to conclude the Crown did not discharge their duty to consult.² The timing of when funds are available is also important. This particular LTC consultation process is both highly complex and of significant importance as the impacts on our Nation will be ongoing and potentially severe. To prepare a proper submission for participation in the Hearing Part 2 required considerable expense. At the time of writing, AFN has not had the capacity to apply for funding.

Internal Governance Structures

Our Chief and Council are directly responsible for all aspects of life for our citizens. We have formal processes which must be followed, similar to any other government. For AFN this includes holding community meetings to inform and gather feedback, seeking guidance from Elders and ensuring our collective rights are protected. Each matter before Chief and Council will have its own inherent timeline and process. While we do our best to work collaboratively with proponents and other governments, our process cannot be disregarded simply to meet their needs.

As a Williams Treaties First Nation ("**WTFN**") and signatory of the Williams Treaties Settlement Agreement 2018, we also have responsibility to WTFN's shared rights. We are currently consulting on the concept of a shared governance structure. Ensuring we create the correct structure is essential and requires proper consultation with multiple right's holders.

Due to capacity and funding constraints and the importance of our governance structures, AFN has not been able to prepare a fully completed submission. However, we do not want the Commission to interpret this as implicit consent to the consultation process. To ensure this is not the case, please accept the following as our position on the consultation process from the CNSC regarding the DNNP LTC.

AFN supports the clean energy objectives of the federal government, and the Government of Ontario but requires that the implementation of those objectives, including the CNSC's review of the DNNP licensing process, be fully consistent with:

- Canadian law that includes AFN's s. 35 constitutionally protected Aboriginal and treaty rights and the legal requirements of consultation and accommodation with respect to potential impacts on those rights;
- *The United Nations Declaration of the Rights of Indigenous Peoples Act*³ ("**UNDRIPA**") and the commitment of the federal government and its Ministries and agencies to respect the territorial rights of Indigenous peoples and to seek their free, prior and fully informed consent in decisions that affect them, their communities and territories;

² *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*, 2017 SCC 40 at para 47.

³ SC 2021, c 14 [**UNDRIPA**].

- The findings of the Truth and Reconciliation Commission of Canada⁴ ("TRC") with respect to the lasting impacts of the residential school system on First Nations peoples and families and in particular Call to Action No. 92 calling upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*⁵ ("UNDRIP" or the "**Declaration**") as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources; and
- The *United Nations Declaration of the Rights of Indigenous Peoples* Action Plan ("UNDA Action Plan").⁶

Consultation Process Summary

1. The CNSC's consultation and hearing process has treated AFN as a stakeholder not a right's holder and has not been culturally appropriate.
2. The CNSC's consultation process has not upheld the Declaration nor has our consent been sought by the CNSC, nor have we given consent, during the LTC process.
3. The requested Rights Impact Assessment timelines imposed by the CNSC are incompatible with our ability to conduct a proper impact assessment.
4. To the best of our knowledge the CNSC has not started an Indigenous Knowledge study.
5. AFN should have been invited to participate in the Hearing Part 1 as other government ministries were invited to do. From AFN's perspective CNSC's and OPG's Hearing submissions on the DTCA went from misleading to incorrect. Without allowing the rights holding First Nation's an opportunity to speak at the Hearing, these inaccuracies went unchallenged.
6. The onus to ensure proper consultation with AFN has been placed on us to negotiate terms, including the signed Letter of Intent ("**LOI**") with OPG. We believe OPG's intentions to work with us meaningfully are sincere. However, we are not aware of any CNSC process that will hold OPG accountable if this does not happen.

Requests

1. It is imperative that our Indigenous perspectives are not just sought but are integrated into the consultation, review and decision-making process throughout the entirety of the DNNP and future nuclear projects. For some aspects of projects, such as waste, our consent is also required. The Indigenous Advisory Committee and Monitor Program established by the Canadian Energy Regulator

⁴ Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015), online (pdf): *National Centre for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

⁵ *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, A/RES/61/295 (2 October 2007).

⁶ Government of Canada, "The *United Nations Declaration on the Rights of Indigenous Peoples* Act Action Plan" (2023), online (pdf): Justice Canada <<https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>>.

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under the authority of the Ministry of Natural Resources Canada is a model that we are requesting the CNSC adopt to help meet its legal requirement of meaningful consultation and consent.

2. We are requesting the Commission order the creation of regulatory holdpoints with an enforcement mechanism to ensure that OPG is meeting its consultation obligations and upholding the intent of the negotiated LOI.