



**Written submission from
Curve Lake First Nation**

**Mémoire de la Première Nation
de Curve Lake**

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

Government Services Building
22 Winookedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

Commission Registry and Registrar
Canadian Nuclear Safety Commission
280 Slater Street
P.O. Box 1046, Station B
Ottawa, ON K1P 5S9
Tel.: 613-996-9063 or 1-800-668-5284
Fax: 613-995-5086
Email: interventions@cnsccsn.gc.ca
Email: Consultation@cnsccsn.gc.ca

November 11, 2024
(Submitted by Email)

RE: Curve Lake First Nation's ("CLFN") submission on the Canadian Nuclear Safety Commission's ("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.

Dear Registrar,

On behalf of the Consultation Department at CLFN, we are providing this written intervention pertaining to the CNSC's consultation process for the DNNP LTC. Please refer to **Appendix A** of this letter for details. We are looking forward to our ongoing and upcoming meetings in November and December 2024 to discuss these topics.

We do this work to uphold our responsibilities to care for the earth and waters, for our people, our nation, and for all our relations. Our foundational belief is balance; our values and principles are built upon the respect, care, and nurturing of all life as part of an interconnected whole and necessary for the balance and harmony required for Mino-Bimaadiziwin now and for future generations.

Yours sincerely,

Francis Chua
Supporting Curve Lake First Nation
Director - Francis Chua Consulting Inc.

CC:
Chief & Council, CLFN
Consultation Committee, CLFN
Mindy Knott, Director of Culture, Consultation and Economic Development, CLFN
Paige Williams, Manager of Consultation, CLFN
Lois Taylor, Consultation Lead, Resources and Relationships, CLFN
Kayla Wright, Supporting Curve Lake First Nation, Director – Francis Chua Consulting Inc.

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

Appendix A

Curve Lake First Nation's ("CLFN" or "Curve Lake") submission on the Canadian Nuclear Safety Commission's ("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.

The submission topics are organized as follows:

BACKGROUND

- The Darlington New Nuclear Project Site
- Who We Are
- Our Relationship Building and Consultation Approach

INTERACTIONS WITH CNSC

- Our Current Engagement and Consultation with CNSC

REVIEW OF COMMISSION MEMBER DOCUMENTS (CMDs)

- Selected Specific Comments and Concerns Upon Reviewing CMDs

PROGRESS TOWARDS MEANINGFUL CONSULTATION

- Consultation
- Personnel Capacity
- Funding Capacity
- Internal Governance Structures
- Consultation Process Shortcomings
- Requests and Next Steps

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

BACKGROUND

The Darlington New Nuclear Project Site

The DNNP site is located on Michi Saagiig Anishinaabeg lands, waters and the Williams Treaties First Nations territory. The Williams Treaties First Nations ("WTFN") consist of the Mississauga Nations of Hiawatha First Nation, Alderville First Nation, Curve Lake First Nation and, Mississaugas of Scugog Island First Nation as well as the Chippewas Nations of Georgina Island First Nation, Beausoleil First Nation and Rama First Nation. The lands where the DNNP is proposed are covered by the Johnson-Butler Purchase, also referred to as the "Gunshot Treaty" (1787-88), the Williams Treaties (1923), and the lands that were subject to the Williams Treaties First Nations settlement agreement.

Who We Are

CLFN citizens are Anishinaabe from the Mississauga Nation. Through hard work and determination, it was our ancestors that shaped and made our First Nation the great place it is today. Here in Curve Lake, we have a special uniqueness that we are proud of.

Our culture, language and old ways of living are still with us. Over the last century, we've become a model community to surrounding First Nations. Our people are our most valuable resource. Presently, our First Nation's registered membership is approximately 2,177.

CLFN is located roughly 25 kms northeast of Peterborough, Ontario. Our territory consists of a mainland peninsula and large island (Fox Island) on Buckhorn and Chemong Lake. CLFN also co-owns smaller islands located throughout the Trent Severn Waterway system. The total land base of the First Nation is approximately 900 hectares.

CLFN is a cultural partner of the Michi Saagiig (Mississauga) Nation, with traditional territories expanding through most of southeastern Ontario, including lakebeds, tributaries, and watersheds. Between the years 1781-1923, the Mississaugas participated in signing eighteen treaties on a nation-to-nation basis. This allowed the growing number of European settlers to establish in Ontario. Pressures from increased settlement forced the Mississaugas to slowly move into small family groups around the present-day reservation.

In 1829, the Crown worked with the New England Company, a missionary group, to encourage farming and schooling of First Nations people along the shores of Mud Lake. The Mud Lake settlement officially became a reserve in 1889 with approximately 200 citizens occupying the territory. In 1964, Mud Lake Reserve #35 officially changed its name to Curve Lake First Nation #35.

CLFN is signatory to the Williams Treaties of 1923. It was the last treaty signed in Canada, covered almost 13 million acres and was very controversial. After 90 years of dispute between the Crown and the

Government Services Building
22 Winookedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

WTFNs a final settlement agreement was reached in 2018 which reaffirmed our pre-confederation treaty Rights.

The 1923 Williams Treaties were signed between the WTFNs and the Crown with the spirit and intent to share the lands and resources of southern Ontario with the European settlers. They were intended to resolve longstanding claims from the WTFN communities regarding settlers encroaching on their traditional lands. Instead, the conclusion of these treaties created continuing injustices and the inability to freely exercise harvesting.

Unbeknownst to the Mississauga and Chippewa communities, the interpretation by the Crown was that the Williams Treaties extinguished all harvesting Rights outside of the reserves of each First Nation. It was not until 2018, 95 years later, that a settlement agreement was reached between the WTFNs and the Governments of Canada and Ontario.

The settlement agreement formally recognizes the pre-existing Treaty harvesting Rights of the WTFN members to hunt, trap, fish and gather for food, social and ceremonial purposes within portions of their traditional territories and Treaty areas. The Settlement Agreement also included a Statement of Apology from the Governments of Canada and Ontario for the negative impacts of the 1923 Williams Treaties on the signatory Nations.

Our Relationship Building and Consultation Approach

CLFN is the steward and caretaker of the lands and waters within our territory in perpetuity, as we have been for thousands of years. We have an obligation to continue to steadfastly maintain this responsibility to ensure their health and integrity for generations to come. Protection, conservation, and sustainable collaborative management are priorities for CLFN.

CLFN possess inherent Anishinabe Rights protected by s. 35 of the *Constitution Act*, 1982. CLFN asserts Aboriginal and Treaty Rights over lands and resources within our Traditional and Treaty Territory. The Supreme Court of Canada has established that Aboriginal peoples asserting Aboriginal and Treaty Rights must be consulted and accommodated prior to occurrence of any decisions, conduct or activities that may have an impact on the Rights and interests of those peoples.

CLFN will engage in consultations that may lead to accommodations with respect to any and all decisions, conduct and activities that have the potential for adverse impacts on its Aboriginal and Treaty Rights respecting lands and resources within the CLFN's Traditional Territory. CLFN has adopted Consultation and Accommodation Standards found on the CLFN website, as interpreted and implemented in current practice, and as amended in the future, to establish the parameters for all consultations with us. CLFN's vision statement must be central to development in the territory:

“Upon the foundation of community values and vision that promotes and preserves our relationship with mother earth, which has defined and will continue to define our identity and culture as

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

Anishnaabe People, the Consultation Department will build and secure the framework for our First Nation lands by putting into place ways and laws that will provide both the protection and the freedom for each person, their family, and the whole community to fulfill their potential. Each way and law will be given the consideration to its importance for our next seven generations.”

Our Consultation Department has emphasized that environmental protection and sustainability is an integral component of the future of CLFN. Working with CLFN to develop project concept, design, planning, assessment, potential and actual impacts, monitoring, etc. are necessary steps in our process. All plans and activities must be viewed through the lens of environmental protection and sustainability. These requirements ensure that CLFN’s interests and Rights are being protected within our territory; that we are able to protect the ability to exercise our Rights as a people – physically, culturally, and spiritually; that we are able to uphold our sovereignty, cultural identity, and implement sustainable succession. This is central to all relationships being progressed with various regulators and proponents.

As noted in previous written correspondences, CLFN has made great strides in the last few years to build relationships and engage in open dialogue on a government to government and government to corporation basis as it relates to consultation processes. Consultation and accommodation are critical in ensuring that the Rights and interests of the Michi Saagiig Nation are prioritized regarding projects in our territory.

CLFN would like to acknowledge CNSC staff in their dialogue and work with our Consultation Department since 2020 until the present. There are many topics and projects that have been covered and as everyone can appreciate, meaningfully consulting on and addressing each topic or project takes time, commitment, and focus. As demonstrated from 2021-2024, we continue to be optimistic that our Terms of Reference and Work Plan will result in progress and improvements in 2025 and beyond. We acknowledge that the CNSC has provided additional capacity support through CNSC’s Indigenous and Stakeholder Capacity Fund; this is under implementation and in concept will help in the numerous nuclear sector topics and projects.

CLFN would also like to acknowledge OPG staff in their dialogue and work with our Consultation Department since 2020. OPG has invited CLFN to discuss relevant areas of interest several times and we value the face-to-face interactions along with the monthly virtual meetings. These interactions are positive relationship building strides and we look forward to our evolving relationship. The number of topics and projects are also numerous with OPG and capacity considerations are being discussed.

Timing and capacity are the initial barriers to meaningful consultation and CLFN wishes to thank CNSC and OPG for their work in addressing these initial barriers and in their commitment and effort to work together to significantly improve programs, processes, approaches, and guidance in order to meaningfully progress relationships, consultations, and reconciliation. CLFN trusts that, like us, CNSC Staff, CNSC Commission Members, OPG Staff, and OPG leadership remain committed to this path of reconciliation we have embarked upon and recognize there is still much to do.

CLFN’s Consultation Department is progressively building capacity to match the various consultation needs in the nuclear sector. We view this submission process merely as a formal check-in point and we

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

look forward to continuing dialogue and consultation beyond the confines of this process and we look forward to the future when the CNSC decisions are made in conjunction with the CLFN.

CLFN's submission is intended to bring forth the voice of CLFN in the written intervention and in the oral intervention. CLFN also supports the interventions put forth by the Mississaugas of Scugog Island First Nation, Hiawatha First Nation, and Alderville First Nation. The values, principles, goals, and recommendations set forth in these interventions come from a common place and a common desire to stand together as sister Nations; and as we also walk together with CNSC and OPG to bring about progressive and positive changes.

CLFN is committed to continue working together with CNSC and OPG in good faith throughout the life-cycle of the consultation, accommodation, regulatory and relationship building processes. CLFN is committed to continued engagement and consultation in advance of the Hearing Part 2 including assessing potential impacts on Rights to identify additional commitments, mitigations and a path forward to addressing the concerns related to OPG's LTC application.



INTERACTIONS WITH CNSC

Our Current Engagement and Consultation with CNSC

CLFN acknowledges the general premise and approach taken by the CNSC. The statements made by CNSC staff at the Hearing Part 1 (see bullets below) generally resonate with CLFN with a certain degree of alignment but there is also misalignment.

There is a certain degree of alignment in that CLFN recognizes the effort made by CNSC in engagement and consultation. Given the current systemic structures, processes, and timelines that CNSC and CLFN have to work within, as much as they are not ideal, a positive relationship between CNSC and CLFN is being built and it provides a better foundation to tackle challenging issues, to incrementally shift approaches, to find meaningful space for different worldviews.

There is a certain degree of misalignment in that CLFN recognizes that there is still much to do and the programs and processes at the CNSC need to evolve to ensure they create a space for meaningful consultation. The key issues, points of misalignment, points of disagreement, opportunities of improvement are discussed in later sections. CLFN recognizes CNSC's statements but disagrees, given the current systemic structures, processes, and timelines that CNSC and CLFN have to work within, that these interactions and activities result in meaningful consultation.

- *CNSC staff have undertaken consultation activities related to OPG's LTC application with consideration of current best practices and First Nation requirements for consultation, the Government of Canada and CNSC's commitments to Reconciliation and the principles of UNDRIP with the goal of striving to balance the Crown's obligations to consult and accommodate on activities which have the potential to negatively impact Aboriginal and Treaty Rights, with the goal of achieving consensus with respect to the application.*
- *CNSC staff have aimed to have a flexible and customized approach to consultation, being mindful and sensitive to each First Nation and Indigenous communities' specific Rights, interests and needs.*
- *In order to fulfill the CNSC's Duty to Consult obligations for the decision before the Commission, CNSC staff sent early notification of the expected LTC application in May 2022 and since then have continued to provide multiple opportunities for consultation, engagement, dialogue and collaboration with all identified Indigenous Nations and communities. CNSC staff note that since May 2022, consultations and discussions have occurred simultaneously regarding the previous and related decision on the applicability of the EA to the chosen technology, OPG's Licence to Construct application and topics relevant to other licensing phases of the DNNP.*
- *CNSC staff have undertaken consultation and engagement activities or offered opportunities for consultation on:*
 - *Issues, interests or concerns raised by the identified First Nations and Indigenous communities*
 - *CNSC staffs technical review, assessments and recommendations*

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

- *Potential impacts on Aboriginal and/or Treaty Rights and potential measures, commitments and/or conditions to meaningfully address potential impacts and concerns identified by the Nations.*
- *CNSC staff made efforts to consult and engage through multiple phone calls, correspondence, and meetings with leadership and community representatives. To support such efforts, as part of Duty to Consult obligations, the CNSC provided funding and capacity support. CNSC staff made efforts to collaborate with First Nations and Indigenous communities on the CNSC's consultation report and issues tracking tables with the goal of ensuring each First Nation and Indigenous communities' views and perspectives were accurately reflected and to build consensus regarding OPG and CNSC response to key issues, concerns, recommendations and questions raised. CNSC staff have also encouraged and supported the identified First Nations and Indigenous communities to participate in the Commission's public hearing process to advise the Commission of any concerns they may have and proposed resolutions to the concerns.*
- *CNSC staff have also begun engaging and building relationships with CLFN's consultation committee, leadership and community. CNSC staff attended a meeting with the consultation committee on September 9, 2024 and are planning to attend another meeting in advance of the Part 2 hearing.*
- *CNSC staff and CLFN are also planning to have a community open house in advance of the part 2 hearing to consult directly with the community. CNSC staff have attended some CLFN community gatherings for relationship building and cultural experiences beyond the Duty to Consult for this project. This has provided CNSC staff with more insights into community views.*
- *At this time, CLFN has not raised concerns regarding the DNNP regulatory process occurring in parallel with continued engagement and consultation. This is based on the good faith commitments of the CNSC to work collaboratively to meaningfully address CLFN's interest, concerns, and priorities; to work together to identify and mitigate, compensate, and accommodate potential impacts to CLFN Rights. CNSC and OPG have made commitments to continue to support the efforts being progressed with reviews of permits, designing and implementing the Indigenous Knowledge Study, the Cumulative Impacts Assessment and the environmental monitoring augmentation program; it is on this basis that CLFN has not raised a concern with activities occurring in parallel.*
- *CNSC staff and CLFN are committed to continuing to engage and consult in advance of the part 2 hearing including on assessing potential impacts on Rights to identify additional commitments, mitigations and a path forward to addressing the concerns related to OPG's Licence to Construct application, as appropriate.*
- *Both CNSC and CLFN are committed to continue to work together in good faith throughout the life-cycle of the DNNP, should it proceed.*

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

REVIEW OF COMMISSION MEMBER DOCUMENTS (CMDs)

Selected Specific Comments and Concerns Upon Reviewing CMDs

Upon reviewing CMD24-H3, CLFN wishes to acknowledge the incremental positive changes to the tone and manner of reflection taken within the document with respect to consultation with First Nations. CLFN encourages the CNSC to continue to evolve its understanding of its role as a Crown entity, with respect to understanding, interpreting and implanting the Duty to Consult and Accommodate, as well as the [United Nations Declaration on the Rights of Indigenous Peoples](#),¹ ("UNDRIP"), and the [United Nations Declaration on the Rights of Indigenous Peoples Act](#),² ("UNDRIPA").

Since 2021, CLFN has asserted that the development and approval of the DNNP will result in continued and additional impacts to the Inherent, Aboriginal and Treaty Rights of the Michi Saagiig Anishnaabeg, including, but not limited to impacts to fishing, hunting, and harvesting, impacts to spiritual landscapes, and impacts to species and places of cultural significance.

As set out in within CMD 24-H3, the Commission is being asked to

“[d]etermine whether, taking into consideration the information provided in this CMD and any other relevant information forthcoming, the CNSC, as an agent of the Crown, has upheld the honour of the Crown and fulfilled its obligations to consult and, where appropriate accommodate Indigenous peoples, pursuant to section 35 of the Constitution Act, 1982.” (CMD24-H3, iv)

As such CLFN asserts that a comprehensive Rights Impact Assessment ("**RIA**"), fully informed by our knowledge, history, culture, language, relations, land and water use is required to be able to fully identify, understand and comprehensively address impacts to CLFN's Rights. CLFN is of the view that an effective RIA requires additional sources of information that have yet to be gathered and analyzed through an Indigenous and Rights based lens including, but not limited to, regional or territorial Indigenous Knowledge Studies, comprehensive cumulative impacts assessments, Rights-informed approaches to mitigations, compensations and restorations, and Rights-informed offsets, needs, requirements, and improvements.

Additionally, within Section 1.1 of CNSC's draft "*Supplemental submission on Indigenous Consultation for the DNNP LTC*", which was submitted to CLFN for comment and reviewed on October 28, 2024, the CNSC staff characterize many of the concerns raised by CLFN as not specific to the decision before the Commission. This includes the baseline used to assess potential impacts from the project on the environment and on Aboriginal and Treaty Rights, CNSC's approach to cumulative effects assessment,

¹ *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, A/RES/61/295 (2 October 2007).

² SC 2021, c 14 [*UNDRIPA*].

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

and legacy impacts. **Meaningful consultation to ensure that CLFN's constitutionally protected Aboriginal and Treaty Rights must include consideration of these points.**

Baseline

As noted by CNSC within its draft “*Supplemental submission on Indigenous Consultation for the DNNP LTC*”, the shoreline of Lake Ontario and all of its tributaries were of significant importance to CLFN, its economy, culture, values, spirituality and way of life. Indeed, given the significance of these areas, the pre-confederation Gunshot Treaty(ies) were negotiated to protect the shoreline of bodies of water and mouths of all rivers in our territory.

To be clear, Michi Saagiig Anishnaabeg are currently unable to use land and resources at the Darlington site, not by choice, but because it is inaccessible to us and has been under Ontario's and OPG's control for more than fifty years. Members of our Nation currently use the waters and aquatic resources surrounding the Darlington site, and fully intend to use those resources for future generations. Once the site is decommissioned, the Michi Saagiig Anishnaabeg and likely other WTFNs will want to come back to the land for future generations.

Without an understanding of the true baseline, it is not possible to understand the full extent of impacts on CLFN's Rights. As currently understood, submissions by OPG on environmental effects of DNNP are limited to the environmental impacts only from a Western lens, and do not consider the Rights of the Michi Saagiig Anishnaabeg, and cultural and spiritual values.

Cumulative effects assessment

According to Canada

Cumulative effects can result in impacts to the Aboriginal and treaty Rights, as well as the broader interests, of Indigenous peoples. An understanding of how cumulative effects may impact Rights and interests – which may have a distinct regional and historical context and be more holistic in nature – can result in a more nuanced and accurate consideration of cumulative effects. This, in turn, can better inform decision-making... The Government of Canada has a Duty to Consult and, where appropriate, accommodate Indigenous peoples when it has knowledge, real or constructive, of established or asserted Aboriginal or treaty Rights and contemplates conduct that may adversely affect those Rights. In dialogue, Indigenous peoples may raise cumulative effects as a concern arising from the contemplated Crown conduct on the Rights and interests of Indigenous peoples. Cumulative effects form part of the context that should be taken into consideration when assessing the seriousness of potential impacts to Rights and interests ([Government of Canada, 2024](#)).

Cumulative effects from development in the traditional territory infringes upon CLFN's ability to meaningfully exercise our Rights. CLFN remains hopeful that the CNSC's regulatory approach to assessing impacts to Rights will evolve and consider the cumulative and legacy impacts of the Darlington and Pickering sites. CLFN also hopes that consideration of the Government of Canada's commitments

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

and recent case law³ regarding the importance of assessing cumulative effects to meaningfully understand impacts on CLFN Rights will be undertaken.

UNDRIP & UNDRIPA

As affirmed by the adoption of the *UNDRIPA* and underscored by recent Supreme Court decisions, CNSC's approach to implementation of the *UNDRIPA*, including the principle of Free, Prior and Informed Consent ("**FPIC**") is significant when evaluating the consultation activities of the Crown. Indeed, *UNDRIPA* committed Canada to "take all measure necessary to ensure that the laws of Canada are consistent with the Declaration".⁴

In 2024, the Supreme Court rendered an opinion on UNDRIP, stating that it had been "incorporated into the country's domestic positive law"⁵ In another 2024 Supreme Court decision in *Dickson*,⁶ the court referred to UNDRIP as "binding on Canada."

These decisions have further developed the understanding of the status and interpretation of *UNDRIPA* as well as brought additional clarity to the implementation of UNDRIP in Canada. While additional clarity is still needed, it seems evident that the Supreme Court has highlighted the importance of UNDRIP in interpreting and applying Canadian law, characterizing it as more than simply 'an aspirational document' with 'no legal force in Canada', as was previously found in lower courts.⁷ Indeed, these decisions have underscored the importance of implementing the *UNDRIPA*.⁸

As the CNSC and its licencing process are established through the *Nuclear Safety and Control Act*, the implementation of *UNDRIPA* is relevant to how the CNSC interprets and understands its mandate and regulatory processes, which is an essential component to understanding the Commission's role as well as evaluating and rendering its decision on the OPG DNNP LTC.

³ *Yahey v British Columbia*, [2021 BCSC 1287](#) [*Yahey*].

⁴ *UNDRIPA*

⁵ *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, [2024 SCC 5](#) at para 15 [**C-92 Reference**];

⁶ *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 317 [*Dickson*].

⁷ Churchill et al, "SCC Decision on An Act respecting First Nations, Inuit and Metis children, youth and families: Analysis and Implications" (15 February 2024) online: [SCC Decision on An Act respecting First Nations, Inuit, and Metis children, youth, and families: Analysis and Implications \(2 of 2\) - JFK Law - Canada](#)

⁸ Bankes and Hamilton, "What Did the Court Mean When It Said that UNDRIP "has been incorporated into the country's positive law"? Appellate Guidance or Rhetorical Flourish?" (28 February 2024) online: <https://ablawg.ca/2024/02/28/what-did-the-court-mean-when-it-said-that-undrip-has-been-incorporated-into-the-countrys-positive-law-appellate-guidance-or-rhetorical-flourish/>

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

Significant to UNDRIP and *UNDRIPA* is the principle of FPIC, whereby:

“States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measure that may affect them.” (Art. 19, UNDRIP, 2007)

Article 20 includes the principle that:

Indigenous peoples have the right to...be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”

Sub-article 20.2 goes on to affirm that *“Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.”* ([Art. 20, UNDRIP, 2007](#)) Indeed, Article 28 affirms that there is a duty to provide redress wherever Indigenous lands, territories, and resources have been *“confiscated, taken, occupied, use or damaged”* without FPIC. ([Art. 28, UNDRIP, 2007](#))

It is the view of CLFN that adoption of UNDRIP into Canadian domestic law, and the principles upheld by UNDRIP requires the Commission’s decision to be consistent with UNDRIP, underscore the concerns raised by CLFN to date, as well as validate the requests being made by CLFN.

Throughout CMD24-H3 and CNSC’s draft *“Supplemental submission on Indigenous Consultation for DNNP LTC”*, CNSC staff note that information has been shared, the concerns that have been raised and explain the processes through which negotiation has taken place. It is not enough to simply disclose information and record feedback from impacted First Nations, but rather the Crown must demonstrate meaningful two-way dialogue that demonstrates a true intention to understand and address concerns and explore possible accommodations. As noted throughout this document, there remains a significant opportunity to evolve and to demonstrate meaningful two-way dialogue.

Government Services Building
22 Winookedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

PROGRESS TOWARDS MEANINGFUL CONSULTATION

Consultation

The courts recognize that Indigenous communities have constraints which can lead to inadequate opportunities for them to meaningfully participate in consultation.⁹ 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 CLFN 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 CLFN outstrip 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. Funding 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.¹⁰ 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. Even if funding capacity is approved and provided, the current timelines are not conducive to securing appropriate support to meet certain process deadlines.

⁹ *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.

¹⁰ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*, 2017 SCC 40 at para 47.

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

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 CLFN this includes briefings and presentations to committees, holding community engagement 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, including the timelines and deadlines dictated by those needs.

As a 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, funding timeline constraints, process deadline constraints, and the importance of our governance structures, CLFN has made the best of the circumstances to provide this 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.

CLFN 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 CLFN'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;
- *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; including the recent Supreme Court decisions¹¹ which develop the understanding of the status and interpretation of *UNDRIPA* and bring additional clarity to the implementation of *UNDRIP* in Canada;
- The acknowledgement by the Government of Canada and the Supreme Court regarding the significance of understanding, considering and addressing cumulative affects of development on

¹¹ Reference re An Act respecting First Nations, Inuit and Metis children, youth and families, [2024 SCC 5](#) at para 15 [**C-92 Reference**]; *R v Montour*, [2023 QCCS 4154](#) [**Montour**]; *Dickson v. Vuntut Gwitchin First Nation*, [2024 SCC 10](#) [**Dickson**].

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

Indigenous Rights and the ability for First Nations to meaningfully exercise such Rights within their territory.¹²

- The findings of the Truth and Reconciliation Commission of Canada¹³ ("**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 UNDRIP 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").¹⁴

Consultation Process Shortcomings

- The CNSC has offered capacity funding for CLFN to conduct an Indigenous Knowledge study. The various consultation process steps and deadlines from the CNSC and from OPG competes with the internal work that CLFN needs to do; not only to plan for and implement the Indigenous Knowledge study but also to actually respond to these various consultation process steps and deadlines.
- The CNSC's consultation and hearing process has treated CLFN as a stakeholder not a right's holder and has not been culturally appropriate.
- In recognition of reconciliation and the principles of Nation-to-Nation dialogue, CLFN should have been invited to participate in the Hearing Part 1 as other government ministries were invited to do.
- The requested Rights Impact Assessment timelines imposed by the CNSC are incompatible with our ability to conduct a proper impact assessment and inconsistent with the good faith principles as established by UNDRIP and the Honour of the Crown.
- 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.

¹² Yahey.

¹³ 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>.

¹⁴ 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>>.

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

The onus to ensure that the proper degree of consultation occurs has been placed on CLFN to be engaged in deeper level technical discussions with OPG and 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 have not yet specifically discussed with CNSC how the CNSC process will hold OPG accountable if this does not happen. Furthermore, specific federal and provincial decisions and processes often lead discussions along an already pre-determined path and no longer afford the flexibility that should be the outcomes of the Duty to Consult and where necessary Accommodate. On that note, we also believe OPG's intentions to work with us to overcome these shortcomings are sincere.

Requests and Next Steps

- It is imperative that the Commission consider its decision in light of CLFN's constitutionally protected Rights, the Crown's Duty to Consult and Accommodate, UNDRIP and *UNDRIPA*, and the Government of Canada's commitments.
- While we applaud CNSC's staff in evolving CNSC's consultation efforts, however CLFN Rights, values, culture and spirituality should not be simply documented. Rather, these need to be integrated into the consultation, review and decision-making process throughout the entirety of the DNNP and future nuclear projects. This should occur through meaningful two-way dialogue and long-term accountability.
- The framework and timelines for the RIA should not be imposed on CLFN or any other Michi Saagiig Nations.
- CNSC should continue to evaluate its mandate, role, regulations and processes, in light of *UNDRIPA*.
- CNSC should work with CLFN and OPG to align on regulatory holdpoints and enforcement mechanisms to ensure that consultation and accommodation commitments and obligations are upheld.
- To continue to focus on the requests, obligations, and commitments resulting from the CNSC hearing (January 2024) regarding the Applicability of the OPG DNNP EIS and PPE to the BWRX-300 SMR, to afford these elements the time and space to be planned and implemented. CLFN requests:
 - CNSC and OPG to work collaboratively with each community to understand the nuclear sector, to understand and address concerns regarding nuclear risks and nuclear waste management,
 - CNSC and OPG to continue to engage and consult with each community on Federal and Provincial permits and approvals that are of interest to the Nations,

Government Services Building
22 Winookeedaa Road
Curve Lake, Ontario K0L1R0



Phone: 705.657.8045
Fax: 705.657.8708
www.curvelakefirstnation.ca

- CNSC and OPG to continue to provide each community with the relevant information that has been or may be requested regarding the scope, methodology, data and results of previous and future studies that have been undertaken in relation to the Darlington New Nuclear Project, in order to better understand the project in a more holistic manner,
- CNSC and OPG to continue meeting with interested leaders from the communities to review and present a comparison of current international best practices for the management and storage of used nuclear fuel with current practices at the Darlington site.
- This information will help to address the Nations concerns, as well as the ability for the Nations to fully evaluate and understand impacts of the Darlington New Nuclear Project on their Rights.
- CNSC and OPG to work collaboratively with Curve Lake, Hiawatha, and Scugog Island First Nations to develop and undertake a Comprehensive Gap Analysis for the DNNP.
- CNSC and OPG to continue to give priority and support for a Regional Indigenous Knowledge Study.
- CNSC and OPG to work collaboratively with the Nations to develop and undertake a Cumulative Effects Assessment.
- CNSC to work collaboratively with the Nations to develop and undertake a RIA, that, at a minimum, is informed by the Gap Analysis, Regional Indigenous Knowledge Study, and Cumulative Effects Assessment.
- OPG to continue to work collaboratively with the Nations to establish an Offsite Restoration Fund to be utilized by the Nations to protect and enhance the lands.
- OPG to continue to work collaboratively with the Nations to develop, implement and participate in any Environmental Monitoring Plan or Program for the Darlington New Nuclear Project.
- OPG to continue to work collaboratively with the Nations to develop, implement and participate in an Overall EA Follow Up Program.
- OPG an CNSC to work collaboratively with the Nations to develop and implement Rights-based requirements, needs and improvements, including Rights informed approaches to mitigations, compensations, and restorations.