



Oral presentation

Written submission from the Sagkeeng Anicinabe First Nation

In the Matter of the

Canadian Nuclear Laboratories Ltd.

Application for the renewal of the nuclear
research and test establishment
decommissioning licence for the Whiteshell
Laboratories site

Commission Public Hearing

October 23-24, 2024

Exposé oral

Mémoire de la Première Nation Sagkeeng Anicinabe

À l'égard des

Laboratoires Nucléaires Canadiens Ltée

Demande visant le renouvellement du permis de
déclassement d'un établissement de recherche
et d'essais nucléaires pour le site des
Laboratoires de Whiteshell

Audience publique de la Commission

23-24 octobre 2024



Sagkeeng Anicinabe

INTERVENTION SUBMISSION FOR WHITESHELL LABORATORY LICENCE RENEWAL

INTRODUCTION

1. Sagkeeng Anicinabe Nation (“Sagkeeng”) and its ancestors have lived on, cared for and been part of the lands and waters in and around what is now the Whiteshell Laboratory (“WL”), since before settlers first came to this land. Understanding the evolution of Sagkeeng’s relationship with CNL and CNSC is crucial to understanding the impacts of the Whiteshell Laboratory and its decommissioning on Sagkeeng today.
2. 153 years ago, Sagkeeng’s ancestors entered into Treaty 1 with the Crown. By signing Treaty 1, Sagkeeng agreed to share that part of its territory which was within the boundaries of that treaty, to allow settlers to come and live in the territory, and to jointly steward and manage the territory alongside the Crown. In exchange for sharing the territory, Sagkeeng was promised that it would be able to maintain its traditional way of life as long as the sun would shine and the rivers would flow.
3. 151 years ago, Anishinaabe nations with whom Sagkeeng share kinship ties and diplomatic relations, entered into Treaty 3 with the Crown. They made similar agreements to those in Treaty 1. However, Sagkeeng was not represented at the treaty councils that led to Treaty 3 and did not enter into Treaty 3. Nevertheless, Treaty 3 purported to include lands and waters, north and east of the Winnipeg River, within present-day Manitoba, which had been Sagkeeng’s traditional territory since time immemorial.

4. Sagkeeng states that it continues to have what Canadian courts call ‘Aboriginal Title’ to its territory in Treaty 3 (“Title Territory”).¹
5. Some 60 years ago, the Government of Canada decided, without asking, or even notifying Sagkeeng, that it would build a nuclear reactor on Sagkeeng’s Title Territory. Canada had no right to do so.
6. For the next 55 years, Sagkeeng was alienated from the part of its territory that the WL occupies. Atomic Energy of Canada Limited (“AECL”) and later Canadian Nuclear Laboratories (“CNL”) made little to no effort to have a relationship with Sagkeeng, nor did the Canadian Nuclear Safety Commission (“CNSC”) impose any meaningful requirements on its license-holders in that respect.
7. In 2019, Sagkeeng appeared before the CNSC for the first time at CNL’s latest license renewal hearing for the WL. At that time, Sagkeeng explained the facts described above to the Commission, pointed out that it had not been consulted, and described to Commissioners the difference between “meaningful engagement” and ‘box-checking’ exercises.²
8. In the five years since that hearing, CNL has slowly, but nevertheless has, begun to take to heart the lessons of ‘meaningful engagement’. While there remains significant work to be done, Sagkeeng’s experience with CNL, particularly over the last 24 months, has been markedly different than the relationship prior to that period.
9. As a result, CNL has earned Sagkeeng’s consent for its application to renew its Nuclear Research and Test Establishment Decommissioning Licence (“Licence”), subject to the comments and conditions set out in this submission.³

¹ A statement of claim to this effect is pending in the Manitoba Court of King’s Bench.

² See CNSC Record of Decision Dec 19-H4, para 230.

³ The Order of the Sagkeeng Anicinabe Government which grants Sagkeeng consent for the Licence Renewal is attached to this CMD as **Appendix A**.

10. At this time, Sagkeeng's consent only applies to the renewal of CNL's existing Licence, and to no other regulatory applications or matters.

SAGKEENG

11. Sagkeeng means "the mouth of the river" in Anishinaabemowin. Sagkeeng's primary residential community and Reserve are located at the mouth of the Winnipeg River, where it empties into Lake Winnipeg. This has been Sagkeeng's home since time immemorial.
12. Sagkeeng is an Anishinaabe nation and was formerly known as the Fort Alexander Band, under Canada's *Indian Act*. Sagkeeng is also an Indigenous People within the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples*.
13. Sagkeeng has over 8,000 members, just under half of whom live on reserve. Sagkeeng members continue to exercise their treaty rights, as well as their inherent aboriginal rights, both of which are protected by s.35 of the *Constitution Act, 1982*. Sagkeeng's treaty rights include the right to hunt, fish, trap and gather medicines and food; the right to its reserve land; right to certain annuities from the Crown, and other rights. Sagkeeng's inherent aboriginal rights include but are not limited to; its Aboriginal title to the Title Territory; the right to hunt, fish, trap and gather in its Title Territory, the rights to self-government and self-determination, including the right to make and uphold its laws; the right to care for and maintain its relationship with its lands and waters; and the right to trade and engage in diplomatic relations with other nations (all together, "Sagkeeng's Rights")
14. Sagkeeng's Rights form the basis of its traditional way of life, which the Crown promised to protect when Treaty 1 was signed.
15. Sagkeeng members have relied on the Winnipeg River since time immemorial. Both before and after Manitoba Hydro and its predecessors dammed the Winnipeg River, it has been a critical source of sustenance and trade fishing, trapping and hunting, as well as an irreplaceable site for the transmission of Sagkeeng's language and culture from one generation to the next.
16. Sagkeeng's residential community is the nearest downstream community to WL.

17. As illustrated by Sagkeeng's "Land Use And Occupancy Study Specific To Canadian Nuclear Laboratories' Proposed In Situ Decommissioning Of The WR-1 Reactor At Whiteshell Laboratories" (Sagkeeng LUOS - 1),⁴ the WL is situated in an area that is highly valued by Sagkeeng for fishing, harvesting wild rice, medicines, berries and other food plants, hunting wild game, trapping fur-bearing animals, as well as for participating in important cultural activities such as ceremonies, as well as sharing knowledge with younger Sagkeeng generations. Interview data clearly reveals the Study Area as central to Sagkeeng livelihood, cultural identity and connection to the land, waterways and resources, as it is an area that has been used and relied on by Sagkeeng for generations.
18. Sagkeeng use of the Whiteshell area was extensive prior to the development of the Whiteshell Laboratories facility and, despite alienation from the direct facility area since it was developed in the 1960s, the Sagkeeng LUOS illustrates that it is still an area around which Sagkeeng has strong connections and desired future uses, provided the area is properly healed.
19. Sagkeeng is the priority rights-holder with respect to the lands and waters affected by the WL. Sagkeeng recognizes that some other First Nations may have interests nearby the WL site, that some Treaty 3 Nations may share Sagkeeng's exclusive use and occupancy of its Title Territory and that the Winnipeg River is a shared resource. However, Sagkeeng objects to First Nations from other treaty territories claiming Aboriginal or Treaty rights in the WL area. Such claims are not credible, and not based in evidence (neither traditional oral history evidence or archival evidence).
20. Since mid-2021, Sagkeeng has developed an increasingly productive relationship with CNL. In preparation for this license renewal process, CNL gave Sagkeeng several opportunities to review relevant sections of CNL's CMD. Sagkeeng appreciated that

⁴ Olson, R. and Firelight Research Inc, with The Sagkeeng Anicinabe (2018). Sagkeeng Anicinabe Land Use And Occupancy Study Specific To Canadian Nuclear Laboratories' Proposed In Situ Decommissioning Of The WR-1 Reactor At Whiteshell Laboratories. Sagkeeng's LUOS was filed with the CNSC as Annex 3 to Sagkeeng's CMD in CNL's 2019 licence renewal proceeding.

opportunity. While Sagkeeng does not agree with everything in CNL's CMD, the process which CNL undertook to engage with Sagkeeng on its contents was meaningful.

THE LICENCE RENEWAL REQUEST

21. Sagkeeng consents to CNL's application for a renewal of its Licence to allow for the continued safe operation and decommissioning of WL.
22. At this time, Sagkeeng's consent applies only to the proposed 2025-2027 Licence renewal. Sagkeeng does not consent to any other regulatory applications related to the WL, including but not limited to any future renewals, as well as CNL's application for *in situ* decommissioning.

LAND USE AND END STATE

23. CNL's Licence provides for it to continue decommissioning and pre-closure activities with the goal, upon completion, of fully implementing its Land Use and End State plan ("LUES").
24. As set out elsewhere in this submission, Sagkeeng retains a deep connection to the land occupied by the WL. The state of the land, what it looks like and what it is used for following decommissioning cannot be decided without Sagkeeng's active participation, deep and meaningful consultation, and consent.
25. While Sagkeeng's consent was not sought prior to siting, building or operating the WL, the Commission and CNL have an opportunity to take steps to remedy that injustice by ensuring that the state of the site following the WL's closure is ameliorative of Sagkeeng's Rights and engages Sagkeeng in a governance and stewardship role.
26. The Commission should direct CNL and AECL to ensure that their plans for the future state and uses of the site are ameliorative and contribute to positive rather than further adverse impacts to Sagkeeng and Sagkeeng's rights.
27. The Commission can do this by requiring that CNL's LUES be subject to formal regulatory approval by the Commission, if it is not already. This formal approval should be accompanied by a recognition that the Commission's decisions related to the LUES have

the potential to adversely affect Sagkeeng's Rights, and therefore trigger the Duty to Consult and Accommodate, requiring deep consultation at the 'high end' of the *Haida* spectrum. The final approval of the LUES should be subject to the free, prior and informed consent of Sagkeeng.

28. While Sagkeeng recognizes that this licence renewal hearing is not deciding on closure timelines or end state matters, Sagkeeng notes that closure and post-closure monitoring horizons is an important issue for Sagkeeng and is affected by CNL's decommissioning operations and decisions made during the licence period.
29. Prior to CNL considering any licence amendments which would set or change an institutional control period, or which would set or change post-closure monitoring timelines and scopes, Sagkeeng must be meaningfully consulted and must provide its consent for such plans.

MONITORING

30. Since the 2019 licence renewal hearing, Sagkeeng has established, with support from CNL and AECL, *Niigan Aki*.
31. *Niigan Aki* means "Earth First" and is Sagkeeng's Guardians program, tasked with monitoring the lands and waters of Sagkeeng's territory, and protecting Sagkeeng's Rights and the environment for future generations.
32. Sagkeeng expects that *Niigan Aki* will have a formal role in the closure and post-closure monitoring plans for WL. Through *Niigan Aki*, Sagkeeng, hopes to re-establish and strengthen its stewardship of the lands and waters.
33. It is important for the Commission to be aware that the valued components which Sagkeeng is concerned with may, and may not, overlap with the considerations that CNSC Staff

account for in their evaluation of CNL's performance, for example, in the Environmental Protection SCA⁵ and Waste Management SCA.⁶

34. The valued components with which Sagkeeng is most concerned are described in its LUOS, which was provided to the Commission in 2019. Even where there is overlap between the identified valued components – for example, fish (including fish health and fish habitat), the evaluation criteria may differ between Sagkeeng on the one hand, and CNL and CNSC on the other.
35. Through Niigan Aki, Sagkeeng has begun, and will continue to expand its capacity to, monitor its valued components from a rights and relationship based perspective. Sagkeeng is concerned not only with whether fish are healthy, for example, but also with the health of fish in relation to the ecosystem as a whole, how human health (both physiological and psychological) is affected by the valued component, and how Sagkeeng's Rights and *Anicinabe Pimatziwin* ('living a good life', or 'living life in a good way') are enhanced or harmed by the state of the valued component. CNSC should ensure that these factors are incorporated into its regulation of WL's decommissioning and eventual closure.
36. Once the WL is fully decommissioned and 'closed', and once CNSC has released the WL from licensing, and CNL and AECL have left the territory, Sagkeeng will still be there. Sagkeeng members relied on and cared for the region in which the WL site is located before the WL was built, and it will do so after the WL is gone. Ensuring that the monitoring standards set by CNSC and implemented by CNL are consistent with Sagkeeng's expectations will be an important measure of reconciliation.

CNL AND CNSC CONSULTATION

37. As was also the case in 2019, CNSC Staff are incorrect in their assessment of the Duty to Consult and Accommodate (the "Duty") and its application to this Licence renewal proceeding.

⁵ See e.g. CNSC Staff CMD 24-H7, section 4.9, beginning on page 53.

⁶ See e.g. CNSC Staff CMD 24-H7, section 4.11, beginning on page 68.

38. CNL's Licence, if renewed, will authorize CNL to engage in new decommissioning activities in Sagkeeng's Title Territory which will cause new, and exacerbate existing direct and cumulative adverse impacts to Sagkeeng's Rights. The fact that the WL is an existing facility does not exempt CNSC from consultation. CNSC Staff have not actually considered whether there might be adverse impacts to Sagkeeng's Rights from the Licence renewal, and instead have relied on the exemption of renewals from consultation as set out in CNSC policy. This is not honourable behaviour by Crown representative.⁷ Moreover, the CNSC policy in question (REGDOC 3.2.2) is unconstitutional insofar as it purports to provide a blanket exemption from consultation to certain classes of decision. Every instance of Crown conduct must be assessed on its own merits, for its own potential adverse impacts to Aboriginal and Treaty rights.
39. In contrast to CNSC, CNL has worked constructively and collaboratively with Sagkeeng to ensure that those adverse impacts to Sagkeeng's Rights have been meaningfully accommodated. Because this accommodation was put in place prior to the licence renewal hearing, Sagkeeng is able to provide its consent for CNL's application.
40. Significantly, CNL did not simply assume what appropriate accommodation might be in the circumstances, or assume that no accommodation was required. Rather, CNL came to Sagkeeng to listen and learn, and discussed the potential impacts of its continued decommissioning. CNL then worked with Sagkeeng to discuss appropriate accommodation measures, using Sagkeeng's "accommodation ladder".⁸ Upon agreeing on reasonable accommodation measures which met the requirements of both Sagkeeng and CNL, Sagkeeng's concerns about impacts to Sagkeeng's Rights were appropriately addressed. As a result, CNL earned Sagkeeng's consent for its renewal application.

⁷ CMD 24-H7, pg 88.

⁸ The 'accommodation letter' addresses impacts to Aboriginal and Treaty rights by first preventing any impacts that can be fully prevented; second, by mitigating impacts which can't be fully prevented; and third, by compensating for residual impacts which can't be mitigated (compensation may take many forms, for example, land offsets, or monetary compensation).

41. CNL's engagement with Sagkeeng in this matter has been a model for how proponents of every industry should engage with the Indigenous nations whose territory they are on. CNSC ought to encourage other licensees to adopt the approaches and methods used by CNL since 2021.
42. CNSC staff invited Sagkeeng to participate in consultation activities with them, however, as CNL had already addressed all of Sagkeeng's concerns, further consultation with CNSC staff would not have been productive. Furthermore, as set out by Sagkeeng in correspondence during the current licence period, Sagkeeng has limited confidence in CNSC's ability to meaningfully discharge the Duty to Consult.⁹ Sagkeeng's choice to rely on the proponent to accommodate impacts to its rights does not absolve CNSC of its own failure to consult.
43. While Sagkeeng has no doubt that CNSC staff, particularly those responsible for consultation with Indigenous peoples, mean well, CNSC's existing policies and structure simply do not allow for meaningful consultation. This is the case for several reasons:
 - (a) RegDoc-3.2.2, part 1.2, automatically excludes all "licence renewals with no proposed changes to existing operations as authorized by the Commission" from consultation, notwithstanding that the renewal licence authorizes the proponent to engage in new activities which were not part of the workplan under the previous renewal licence. This part of RegDoc-3.2.2 is likely unconstitutional. Revisions to RegDoc-3.2.2 appear to be at least 12 months behind schedule, and leave CNSC well behind best practices in terms of consultation standards.
 - (b) Sagkeeng has previously identified difficulties created by the division of responsibility for discharging the Duty between CNSC Staff and commissioners. The summary reports provided by staff, and extremely limited exposure of commissioners to Sagkeeng and its concerns leaves doubt as to the ability of the commissioners to truly understand and address Sagkeeng's concerns.

⁹ See e.g. Letter from Corey Shefman (Sagkeeng legal counsel) to Minister Seamus O'Regan, January 29, 2020.

- (c) CNSC’s regulatory documents and other policies lack meaningful procedures for dealing with, and requiring proponents to address, cumulative effects of regulated projects. Given that gap, it is unsurprising that the Commission has failed to incorporate cumulative effects assessment into its decisions. Cumulative effects are a critical valued component impact pathway for Sagkeeng and other Indigenous peoples.
 - (d) CNSC’s hearing procedures lack basic procedural fairness for participants other than the proponent and CNSC staff. Intervenors should have an opportunity to participate fully in the hearing process, as is common in other federal regulatory tribunals. This should include submitting evidence, including expert evidence; cross-examining the proponent and CNSC staff, and having procedures in place for the receipt of Indigenous Knowledge which may not be effectively communicated in writing.
44. Sagkeeng recommends that CNSC accelerate its ongoing review of its consultation practices, including RegDoc-3.2.2 and commit to implementing a revised consultation approach, developed collaboratively with affected Indigenous peoples, before the next licensing process for WL.
45. Sagkeeng adopts and relies on its previous submissions to CNSC on this topic, and refers the Commission to those submissions, including:
- (a) Sagkeeng Preliminary Comments on REGDOC 3.2.2 Indigenous Engagement Discussion Paper, July 24, 2023.¹⁰
 - (b) Sagkeeng’s submission for CNL’s 2021 Regulatory Oversight Report, submitted October 3, 2022, and in particular Tables 1 and 3 of that submission.

¹⁰ Sagkeeng notes that CNSC staff had previously advised (in July 2023) that “a formal consultation process on REGDOC 3.2.2” would follow this preliminary feedback, “likely beginning in Spring 2024.” That process does not appear to have taken place.

46. Sagkeeng intends to participate in the hearing of CNL's renewal application and will make an oral presentation which will include one or more elders, a member of Chief and Council, and Sagkeeng's technical and/or legal advisors.

Appendix A



Sagkeeng Anicinabe

ORDER OF SAGKEENG ANICINABE GOVERNMENT

WHEREAS The Whiteshell Nuclear Laboratory is operated by Canadian Nuclear Laboratories (CNL) on a site owned by Atomic Energy of Canada Ltd (AECL) in Sagkeeng's traditional and ancestral territory;

WHEREAS The Whiteshell Nuclear Laboratory is currently being decommissioned, a process which is expected to take several more years.

WHEREAS Until it is decommissioned, the Whiteshell Nuclear Laboratory site must be maintained in a safe and secure manner, according to a license and conditions which are put in place by the Canadian Nuclear Safety Commission ("CNSC"). That license must be renewed on a regular basis;

WHEREAS In 2018, Sagkeeng participated in the latest CNSC renewal hearing and made several recommendations. Many of Sagkeeng's recommendations are being implemented by CNL;

WHEREAS While there is always room for improvement, CNL's engagement with Sagkeeng since 2019 has improved dramatically as a result of strong bilateral relationships between Sagkeeng and CNL;

WHEREAS Sagkeeng has frequently reminded CNL that good relationships must be maintained, and that Sagkeeng expects the current level of engagement to continue and be enhanced;

WHEREAS Sagkeeng supports the continued safe decommissioning of the Whiteshell Nuclear Laboratory in accordance with established regulatory processes;

WHEREAS Sagkeeng has historically had significant concerns about CNSC's failure to properly consider Sagkeeng's knowledge and the issues facing Sagkeeng members. Despite raising both procedural and substantive concerns with CNSC Commissioners, Sagkeeng's concerns have not been taken seriously;

THEREFORE BE IT RESOLVED THAT:

1. Sagkeeng consents to the renewal of CNL's license for Whiteshell Nuclear Laboratories, subject only to the concerns and suggestions included in Sagkeeng's Commission Member Document submitted for the license renewal hearing.
2. Sagkeeng calls on the CNSC to reevaluate its own internal processes for considering Indigenous Knowledge and the concerns of affected First Nations.
3. Sagkeeng calls on the CNSC to improve its pre-hearing and hearing procedures to provide greater procedural fairness and to show appropriate respect to Indigenous participants.

This "Order of Sagkeeng Anicinabe Government" passed and ratified

this 15th day of July, 2024



CHIEF

COUNCILLOR



COUNCILLOR



COUNCILLOR



COUNCILLOR



COUNCILLOR



COUNCILLOR

QUORUM OF GOVERNMENT IS 5