Canadian Nuclear Safety Commission | Commission canadienne de sûreté nucléaire

CMD 25-H2.76

Date: 2025-05-15

Written Submission from the Mississaugas of Scugog Island First Nation

Mémoire de la Première Nation des Mississaugas de Scugog Island

In the matter of the

À l'égard d'

Ontario Power Generation Inc.

Ontario Power Generation Inc.

Application to renew power reactor operating licence for the Darlington Nuclear Generating Station

Demande concernant le renouvellement du permis d'exploitation d'un réacteur de puissance pour la centrale nucléaire de Darlington

Commission Public Hearing
Part-2

Audience publique de la Commission
Partie-2

June 24-26, 2025

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Canada

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Written Intervenor Submission:

Ontario Power Generation- Darlington Nuclear Generating Station License Extension

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Mississaugas of Scugog Island First Nation

May 15, 2025

MISSISSAUGAS OF SCUGOG ISLAND
FIRST NATION

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To the attention of:

Tribunal Officer, Commission Registry

Canadian Nuclear Safety Commission

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May 15, 2025

Re: Ontario Power Generation - Darlington Nuclear Generating Station – Power Reactor Operating License Renewal – Comments from the Mississaugas of Scugog Island First Nation

Executive Summary

The CNSC ("**Commission**"), the entity responsible for discharging the Crown's duty to Indigenous communities, is considering the application Ontario Power Generation ("**OPG**") has brought forward for a 30-year extension of the Darlington Nuclear Generating Station ("**DNGS**") Power Reactor Operating Licence ("**PROL**"). While originally licensed for a 20-year operating life by the CNSC, the Commission subsequently granted OPG a 10-year extension that expires in the fall of 2025.

The Michi Saagiig Anishinaabeg of the Williams Treaties First Nations are comprised of Alderville First Nation ("**AFN**"), Curve Lake First Nation ("**CLFN**"), Hiawatha First Nation ("HFN") and the Mississaugas of Scugog Island First Nation ("**MSIFN**") (together the "**Michi Saagiig Nations**" or "**Michi Saagiig**"). The DNGS is located within our traditional territory along the north shore of Gchi Neebeesh (Lake Ontario) and utilizes the unceded lakebed for cooling purposes.

We want to acknowledge OPG's teams in their dialogue and work on various projects and topics since 2020. While not to address adverse impacts of the DNGS PROL, OPG and the Michi Saagiig Nations meet regularly, are progressing towards an Indigenous Knowledge Study, and have the beginnings of working tables. We are at the start of a positive relationship, and we look forward to progressing this relationship through process improvements and formal commitments.

While we deeply value the positive relationship and progress with OPG since 2020, including regular dialogue and steps toward an Indigenous Knowledge Study, we are concerned that the CNSC's determination that the Duty to Consult and Accommodate ("**DTCA**") is not triggered for this application limits OPG's scope of formal consultation. The CNSC's determination risks OPG and the CNSC overlooking potential adverse impacts on our Rights, which is inconsistent with our position as treaty partners and sovereign Nations. We seek to build on our constructive partnership with OPG by urging the CNSC to adopt a more robust consultation framework that aligns with the Honour of the Crown.

The CNSC staff, as the Crown in this instance, has determined that the duty to consult and accommodate ("**DTCA**") has not been triggered during this application. As such, the Crown did not engage or consult with the Michi Saagiig Nations when it originally planned and built the DNGS and now wish to extend the life of the DNGS for three decades without any formal regard or commitments to our Rights.

The Crown holds fiduciary and legal obligations to First Nations. The obligations may be established through the common law and the Honour of the Crown, Section 35 of the *Constitution Act, 1982*[1], UNDRIP[2], UNDA[3] or the Truth and Reconciliation Commission[4] ("**TRC**") and government statements in respect of such. Consultation is to progress to a mutually beneficial process between the Crown, proponents and Indigenous Nations and is intended to further the objectives of Reconciliation. This process is to be founded on relationship, mutual respect and cooperation. It is through this broader lens that the Michi Saagiig views this application as giving

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[1] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007) (the "**Declaration**" or "**UNDRIP**").

[3] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ("***UNDA***").

[4] Truth and Reconciliation Commission of Canada: Calls to Action, 2015.

rise to an obligation for consultation to occur. The Michi Saagiig Nations submit that absent this process, the Crown's behaviour is inconsistent with the Honour of the Crown, the terms of the Declaration, the UNDA and the DTCA. Further, the process is contrary to administrative law principles and the *Sparrow test*.[5]

In our view, the legal DTCA test for a project renewal must be purposeful and contextual to understand whether there are potential new adverse impacts or new proposed activities.[6] It is only through this detailed analysis that the extent of any DTCA can be properly determined. There are other considerations which trigger the duty including if the project entails a strategic high-level decision[7] and if economic reconciliation[8] should be a factor. As well the test itself for triggering the DTCA in a renewal application cannot be one that would permit unjustified infringements and fail the *Sparrow test*. Reconciliation involves multiple considerations including but not limited to the DTCA. Upholding the Honour of the Crown requires the CNSC to ensure all considerations have been met.

Nuclear decisions are inherently heightened due to the sensitivity of balancing safety with energy needs. This sensitivity resulted in nuclear energy being specifically designated in the Declaration as being subject to special consideration. This application is the first of its kind in Canada and determining the length of the licence increases the obligations of such license as it is precedent setting; impacting multiple generations and future nuclear licencing processes – for better or worse.

OPG's DNGS PROL application is one of three simultaneous nuclear projects currently in various licencing phases in our traditional territory. Each project requires varying levels of dialogue and consultation placing a considerable burden upon the Nations' consultation teams as regulators for our communities and ways of life. The current process is very challenging for Michi Saagiig and we encourage the Commission to use this application to advance the CNSC processes with the Nations' recommendations to address this burden.

The Application gives rise to the following legal questions:

- What is the proper analytical process, and what are the considerations, for the Crown in a license renewal application?
- Can the Crown and OPG use a "license renewal" to extend the use of the lakebed without having fulfilled the DTCA given the newly recognized status of the Michi Saagiig Nation's interest or taken any steps towards Reconciliation?
- Even if there is no strict DTCA, does the Honour of the Crown obligate the Crown to consider Nation-to-Nation discussions or make at least some formal commitments in furtherance of Reconciliation?
    - If the answer is "Yes", what is required to maintain the Honour of the Crown?
    - If the answer is "No", how does the Crown reconcile its UNDA obligations?

[5] *R. v. Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[6] Duty to Consult and Accommodate renewal test explanation at page 17.
[7] Strategic higher-level decision argument at page 24.
[8] Economic reconciliation considerations at pages 27-29.

- Is a license renewal permitted to infringe without limits or is the applicant required to demonstrate that the application only seeks the minimum infringement necessary? Is infringement for convenience acceptable?
- Does the CNSC application process require a proper analysis of the DTCA including participation of the Michi Saagiig Nations?

The dismissal of the Michi Saagiig Nations' rights is indicative of a process and mindset that has not understood the underlying principles giving rise to the DTCA and the Honour of the Crown and what is necessary to further reconciliation. While not possible to completely restore the Honour of the Crown in this proceeding, it is possible to make progress to improve the relationship between the Crown and the Michi Saagiig Nations. We should not squander these opportunities for improvement but rather recognize them as a concrete step in what we all say is the right direction.

For the reasons provided herein, the Michi Saagiig Nations are asking the Commission to find:

1. This application triggers an obligation to legitimately examine the nature of the Crown's decision, and the potential impacts such decision may have on Indigenous rightsholders, Indigenous rights, treaties, title, agreements and territories;
2. The presumption that renewal applications do not require consultation is rebuttable and may require the Crown to discharge the DTCA;
3. That the DTCA was triggered and that there was a lack of meaningful consultation and accommodation;
4. That even if the DTCA was not triggered, the Honour of the Crown and the law of Canada requires the application of UNDRIP Articles and principles, including free, prior informed consent ("**FPIC**") and economic reconciliation and that the Crown has not fulfilled this obligation, yet;
5. That the way in which the Crown may act honorably is through the imposition of conditions on OPG and commitments of the CNSC.

As such, the Michi Saagiig Nations are asking the Commission to issue the following orders:

1. That in the event the Commission grants an extension of the licence to OPG that:
    (i) The license term is for a maximum period of 20 years; and
    (ii) The licence is conditioned, as discussed herein, to provide a framework for ongoing consultation and the furtherance of Reconciliation between the Crown and the Indigenous Communities;
2. That to address the inadequacies of the CNSC's current process in respect of Indigenous rightsholders and to allow for meaningful participation by the Indigenous rightsholders in the CNSC process, to ensure there is an ability to uphold the Honour of the Crown, make the following commitments:
    (i) A government-to-government relationship which incorporates the Michi Saagiig Nations into the regulatory process, as discussed below.
    (ii) To ensure meaningful consultation and accommodation including economic reconciliation with the Michi Saagiig Nations.

(iii) To a holistic approach to OPG nuclear activities as they impact the Michi Saagiig Nations, instead of the application-by-application basis.

Granting the relief sought by the Michi Saagiig Nations will protect their rights to the maximum extent possible given the circumstances while continuing the positive relationship we have with OPG. There is no demonstrated need for a 30-year extension, which extends beyond the current electricity demand forecasts, rather, this is more convenient for OPG. There can be no legal expectation for a 30-year license renewal as this application is admittedly novel for Canada.

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Part 1 – Introduction

Background

1. Durham and Clarington are important Ontario nuclear regions. PNGS was the first generating station in Canada and has been operating since the 1970s. At the time it was built, it was the world's largest power plant. The DNGS joined two decades later, and the Darlington New Nuclear Project ("**DNNP**") recently received its licence to construct North America's first small modular reactor. Wesleyville was announced in late 2024 as the newest nuclear site in the region. These four nuclear sites are located on the traditional and treaty territory of the Michi Saagiig Nations. All four sites are simultaneously in some phase of planning and licencing. The First Nations are tasked with managing this unprecedented level of nuclear activity, which, unlike OPG and the CNSC's dedicated teams, is only one sector requiring our consultation.

2. The DNGS is a 4-unit Candu reactor nuclear generating station which has been in service since 1990. It is located in Darlington, Ontario on the shores of Lake Ontario. It has the capacity to produce 3,500 MW. The original life span of the station was 20 years. The Ontario government decided to refurbish the four reactors instead of decommissioning them after the initial 20 years. A further 10-year licence was issued and expires in 2025. The refurbishment was conducted with the view of a 30-year life cycle, and OPG is already using the year 2055 as the end of life for the reactors, despite the application process being underway.

3. OPG is one of the largest power producers in North America and controls all four nuclear sites in our Territory. OPG is asking for an extraordinary licence – a 3-decade renewal – which is the first of its kind in Canada, and in both administrative law applications and Aboriginal law considerations, must increase the sensitivity of the decision. Such an application requires a robust analysis of the nature of the application and its implications on the Michi Saagiig Nations and our Rights.

4. While OPG has demonstrated a commitment to engagement through regular meetings and collaborative initiatives, such as the planned Indigenous Knowledge Study, the CNSC's PROL submission lacks a comprehensive analysis of Indigenous consultation obligations. This gap hinders the ability to fully address potential impacts on Michi Saagiig Rights, contrary to the CNSC's role as a fiduciary and its stated commitment to reconciliation."

5. The CNSC is the Crown agency responsible for regulating nuclear activity in Canada to protect health, safety, security and the environment. The CNSC is also responsible for protecting Indigenous communities. As a fiduciary, it should not be adverse to First Nations as they are in a position of trust and are responsible for discharging the Crown's obligations.[9] This relationship goes beyond what the Crown owes the general public and must be the first consideration in determining whether infringement of Aboriginal Rights can be justified.[10] The justificatory standard to be met may place a heavy burden on the Commission and requires deciding if the infringement is minimal and whether fair compensation has been

[9] Mary C. Hurley, "The Crown's fiduciary relationship with Aboriginal peoples", Library of Parliament PRB 00-09E (10 August 2000, revised 18 December 2002), online (pdf): https://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0009-e.pdf.

[10] *Guerin v. The Queen*, [1984] 2 SCR 335.

available.[11] When Aboriginal title is at issue, the Court in *Delgamuukw* found that the Crown's obligation to consult affected Indigenous groups "must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[12]The court also stated that the Crown is under a moral, if not legal, duty to enter into and conduct negotiations with Indigenous groups in good faith.[13]

6. The Michi Saagiig Nations are signatories to several pre-Confederation Treaties, the Williams Treaties of 1923 and the 2018 Williams Treaties First Nations Settlement Agreement. Being Treaty partners increases the Crown's obligations to us. We agreed to share the land that the DNGS is situated on in return for protection of our Rights.

7. The Michi Saagiig Nations recognize that the DNGS needs to continue operating at this time. Ontario is in dire need of maintaining its current electricity supply. Removal of the DNGS from service would deprive Ontario of approximately 3500 MWs of base load power. This source cannot be replaced readily. Ontario needs Darlington.

8. In fact, we support the clean energy objectives of OPG, the federal government, and the Government of Ontario and do not oppose a licence renewal. At the same time, we submit that development and use of our shared land and resources while adversely impacting our Rights must include full participation and mutual decision-making by the Michi Saagiig Nations. This is consistent with our sovereignty, laws, responsibilities and rights, and Reconciliation processes.

The Law on Reconciliation

9. The process of fulfilling the Government of Canada's obligations to Indigenous communities has significantly evolved since 1990. Case law on the DTCA, the Declaration and FPIC, *UNDA*, treaty and settlement negotiations, legislative enactments and Canada's commitments adopted through policies and plans inform honourable Crown conduct and how to discharge fiduciary duties to First Nations.

10. Canada endorsed the Declaration in 2016 without qualification and committed to its full and effective implementation.[14] This endorsement confirmed Canada's commitment to a relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership, which is broader than the DTCA.[15]

11. On June 21, 2021, *UNDA* came into force. *UNDA* requires, in consultation and cooperation with Indigenous peoples, to, among other things take all measures necessary to ensure federal laws are consistent with the Declaration, including FPIC.[16]

12. Passing *UNDA* gives Indigenous consent the constitutional strength of s. 35 of the *Constitution Act, 1982*. Consent is a continuous obligation, not a one-time decision, and creates a strong relationship between parties. Understood correctly, consent is a powerful

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[11] *Sparrow*, *supra* note 4; *Hurley*, *supra* note 9.
[12] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 168. [*Delgamuukw*]
[13] *Hurley*, *supra* note 9.
[14] Crown-Indigenous Relations and Northern Affairs Canada, "Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples" (April 2024), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1524502914394/1557512757504>.
[15] *Ibid.*
[16] *Ibid.*

tool for proponents to ensure projects proceed expeditiously and is common practice in overlapping jurisdictions throughout Canada.

13. On June 21, 2023, Canada released the *UNDA* Action Plan including 181 measures to implement the Declaration throughout Canada and providing a roadmap for implementation of UNDA.[17] Part of Justice Canada's initiatives is to ensure consistency of federal laws with the Declaration.[18]

14. Courts are to interpret legislation consistently, in a manner that achieves the purpose and intent of the legislation. After having made the legislative enactments described above, Canada included an amendment to the *Nuclear Safety and Control Act* ("**NSCA**"), which is reproduced below:

> **Rights of Indigenous peoples**
>
> 72.1 (1) The provisions enacted by this Act are to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.[19]

15. This requires the CNSC's conduct to be consistent with Canada's obligations to uphold Aboriginal and treaty rights, including Indigenous rights in the Declaration.

16. Justice Blackhawk reinforced this interpretation in her *Kebaowek* decision.[20] The Court found that the Declaration applied in three ways: 1) as an interpretative aid, 2) as the foundational framework and legislative measure that implements that framework, and 3) through the presumption of conformity to international law.[21] She also highlighted the distinction between the DTCA and FPIC. While they have similar objectives, FPIC is a single universal standard as opposed to the DTCA which sits upon a spectrum based on the combination of the strength of rights and the potential infringement.[22] Once the conditions exist to engage the requirement of FPIC, there is no analysis on the strength of those conditions before FPIC applies. This is the case when hazardous waste, such as nuclear waste, is created and stored on Indigenous territories. To be clear, the Declaration applies in this application independent of the DTCA.

17. This is also consistent with the federal government's own policy. National Resources Canada ("**NRCan**") is the federal ministry responsible for improving the quality of life of Canadians by ensuring the country's abundant natural resources are developed sustainably, competitively and inclusively.[23] NRCan states that partnering with Indigenous Peoples, communities, and businesses is critical to building an inclusive, sustainable and resilient natural resource sector in Canada. NRCan is committed to working *together with*

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[17] *UNDA*, *supra* note 3.

[18] Department of Justice Canada, News Release, "Third annual progress report on the implementation of *the UN Declaration on the Rights of Indigenous Peoples Act* highlights progress and points to where further work is needed" (20 June 2024), online: *Department of Justice Canada* <https://www.canada.ca/en/department-justice/news/2024/06/third-annual-progress-report-on-the-implementation-of-the-un-declaration-on-the-rights-of-indigenous-peoples-act-highlights-progress-and-points-to-.html>.

[19] *An Act to amend certain Acts and to make certain consequential amendments (firearms)*, 2023, c 32, s 72.1.

[20] *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 [*Kebaowek*].

[21] *Kebaowek* at paras 76, 77 and 84.

[22] *Kebaowek* at para 112.

[23] Natural Resources Canada, online: *Natural Resources Canada* <https://natural-resources.canada.ca/home>.

Indigenous Peoples to build nation-to-nation relationships founded in mutual respect, partnership and recognition of rights and stated: "[A]dvancing reconciliation means not only transforming our words but our actions…".[24]

18. NRCan states the relationship between the ministry and Indigenous Peoples and communities is to be achieved through continuous consultation and cooperation to secure FPIC for decisions that impact Indigenous communities and their rights.[25]

19. Section 3 of NRCan's Policy for Radioactive Waste Management and Decommissioning states that the federal government:

> 3.1 acknowledges, respects and honours that First Nations, Inuit and Métis peoples have unique status and rights in Canada, as recognized and affirmed in the *Constitution Act, 1982*, and affirms that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous Peoples;
>
> 3.2 commits to reconciliation and the implementation of the United Nations Declaration on the Rights of Indigenous peoples and that the conduct of the Crown will be guided by any framework or measure developed by Canada for Indigenous reconciliation, **and that is relevant to radioactive waste management and decommissioning, including measures taken for the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act***;
>
> 3.3 **commits to facilitating meaningful Indigenous engagement, on an early and on-going basis, through capacity building among Indigenous peoples, information sharing and collaboration**;
>
> 3.4 recognizes that early, continuous and meaningful engagement with Indigenous peoples that may be affected by radioactive waste management and decommissioning projects, which aims at securing their free, prior and informed consent, provides opportunities to build trust and strengthen mutually beneficial and respectful relationships with Indigenous peoples by ensuring Indigenous communities are informed and supported with regards to these projects;
>
> 3.5 recognizes the importance of Indigenous knowledge and the important role that Indigenous peoples play in relation to the stewardship of the lands and waters of their territories over several generations;
>
> 3.6 **acknowledges that some radioactive wastes in Canada are located within Indigenous traditional and treaty territories, and that these wastes may have been created and stored without prior engagement or consultation, and recognizes the importance of working together with affected Indigenous peoples to find a path forward to address these past issues.** [emphasis added][26]

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[24] Natural Resources Canada, "Reconciliation and natural resources" (21 November 2023), online: *Natural Resources Canada* <https://natural-resources.canada.ca/our-natural-resources/indigenous-peoples-and-natural-resources/reconciliation-and-natural-resources/25147>.

[25] *Ibid.*

[26] Government of Canada, "Canada's Policy for Radioactive Waste Management and Decommissioning" (last modified 20 December 2024), online: *Government of Canada* <https://natural-resources.canada.ca/energy-sources/nuclear-energy-uranium/canada-s-policy-radioactive-waste-management-decommissioning>.

20. The federal government's DTCA process applicable to Crown agencies such as the CNSC is set out in their Consultation and Accommodation Guidelines ("**Guidelines**")[27], but DTCA policy is only part of the reconciliation process. Parliament has mandated Crown agencies to expediently implement the Declaration, integrate the UNDA Action Plan, be responsive to the Calls to Action from the TRC and discharge their duty to consult and, if appropriate, accommodate. Failure to adhere to these commitments would be inconsistent with the Honour of the Crown.

21. In situations where the Crown is deciding to renew or extend an existing permit or approval, there is a presumption that the DTCA is not required based upon the premise there are no new infringements – the status quo continues. That presumption is open to rebuttal beyond what we believe the Crown has considered. To hold otherwise would depart from the fundamental principles that inform and support Reconciliation and the requirements of a fiduciary.

22. The Crown is obligated to do more than check a consultation box – it must act honourably in dealing with Indigenous Nations. Honour requires the Crown to:

    1. consider whether the decision triggers the DTCA;
    2. consider UNDRIP;
    3. consider FPIC;
    4. consider what is required to fulfill any agreements;
    5. consider economic reconciliation; and
    6. to act honourably and to further reconciliation.

23. A formal analysis of these considerations has not taken place, and we submit, as detailed in Part 3, that the presumption has been rebutted.

24. Most major resource projects in Canada are moving beyond a DTCA analysis and towards maximizing Indigenous leadership within all stages of a project to ensure project certainty. Proponents often recognize and understand that going beyond minimum legal requirements has many benefits to the project. This evolution incorporates principles of the Declaration and uses FPIC as the foundation of a process and relationship. It is less about consenting to a project proceeding, and more about working together on how to ensure it proceeds successfully. This is the process the Michi Saagiig Nations require from the CNSC, and this submission offers solutions to get us there.

25. We believe OPG has the desire to create this process with us. Our relationship is progressing in the right direction, but we remain without any formal agreements or concrete processes to protect our rights or to participate in the economic benefits of this project. The CNSC can be instrumental in advancing this objective through a licence condition and through their regulatory framework.

26. However, the CNSC is working with an outdated regulatory framework which has not adapted to Canada's obligations to Indigenous rights. It does not reflect Canada's

[27] Government of Canada, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (March 2011), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729>.

reconciliation roadmap nor NRCan and the CNSC's own stated reconciliation commitments.

27. The Honourable Gary Anandasangaree, Minister of Crown-Indigenous Relations, stated:

> *"The UN Declaration Act and the related Action Plan are key parts of the roadmap to reconciliation. They help guide Canada's collaborative efforts with Indigenous partners to address the harmful legacies of colonization, and build renewed relationships based on a fundamental respect for Indigenous rights."*[28]

28. Pierre Tremblay, President and CEO of the CNSC, opened the Hearing Part 1 on October 2, 2024 (the "**Hearing**") by stating that reconciliation is a priority for him.[29] This comment echoes former President and CEP of the CNSC, Rumina Velshi's, 2022 statement:

> *"Notably in Canada, the federal government is committed to reconciliation with Indigenous peoples, a commitment we at the CNSC embrace wholeheartedly. And federal legislation was adopted last year that provides a roadmap for implementing the United Nations Declaration on the Rights of Indigenous Peoples. In short, doing things as they were done before is no longer an option, and that should be welcome news."*[30]

29. During a 2024 keynote address, Mr. Tremblay spoke about the CNSC's encouragement of Indigenous consultation and engagement. Under the topic of trust building, he stated that "[A]s an agent of the Crown, the CNSC has a responsibility and obligation to meet its Duty to Consult and Accommodate when decisions that the Commission makes could potentially impact Indigenous or treaty rights."[31]

30. While the Michi Saagiig Nations were pleased to hear Mr. Tremblay's commitment to the DTCA and to the cultural improvements at the DNNP LTC Hearing Part 2, reconciliation and the Honour of the Crown requires honourable conduct beyond that one duty.

31. The federal reconciliation policy highlights that while one project may not require robust consultation, the way the Crown treats Indigenous partners will impact future relationships. The CNSC has stated its vision is to build trust and advance reconciliation and claims to

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[28] Department of Justice Canada, News Release, "Third annual progress report on the implementation of *the UN Declaration on the Rights of Indigenous Peoples Act* highlights progress and points to where further work is needed" (20 June 2024), online: *Department of Justice Canada* <https://www.canada.ca/en/department-justice/news/2024/06/third-annual-progress-report-on-the-implementation-of-the-un-declaration-on-the-rights-of-indigenous-peoples-act-highlights-progress-and-points-to-.html>.

[29] Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 1.

[30] Canadian Nuclear Safety Commission, Speech, "Remarks by Rumina Velshi at the NEA Workshop on the Management of Spent Fuel, Radioactive Waste and Decommissioning in SMRs or Advanced Reactor Technologies" (8 November 2022), online: *Government of Canada* <https://www.canada.ca/en/nuclear-safety-commission/news/2022/11/remarks-by-rumina-velshi-at-the-nea-workshop-on-the-management-of-spent-fuel-radioactive-waste-and-decommissioning-in-smrs-or-advanced-reactor-tech.html>.

[31] Canadian Nuclear Safety Commission, Speech, "Keynote address by Pierre Tremblay, President and CEO of CNSC at the 5th International Conference on Generation IV and Small Reactors" (3 October 2024), online: *Government of Canada* <https://www.canada.ca/en/nuclear-safety-commission/news/2024/10/keynote-address-by-pierre-tremblay-president-and-ceo-of-cnsc-at-the-5th-international-conference-on-generation-iv-and-small-reactors.html>.

support the implementation of the UNDA Action Plan.[32] It is perplexing to us then that the CNSC has determined it does not owe a duty to consult us. We believe that determination is incorrect at law but also runs counter to the Guidelines, NRCan and the CNSC's own position.

32. The disconnect between the Crown's stated goals and its conduct is one reason for the Michi Saagiig Nations continuing to seek the creation of an Indigenous Advisory Committee ("**IAC**") Task Force. The task force is a concrete step in repairing the trust relationship between the First Nations and the CNSC. The IAC is not a working group, but instead would operate independently to increase Indigenous involvement and allow for oversight, monitoring and participation in decision making throughout the process, not simply responding to decisions once made.

33. Granting a licence that will run unabated for 30 years, or one and a half generations, without integrating the Michi Saagiig Nations into the CNSC's consultation process will have a ripple effect during subsequent licencing processes. It is critical to ensure that the Crown, the regulators, proponents and rights holders establish a proper and consistent process for consultation. The Michi Saagiig Nations are committed to working with the CNSC to create industry standards which uphold the principles of Reconciliation.

34. NRCan boasts being the first federal department with a sector, the Indigenous Affairs and Reconciliation and Major Management Sector, named in an Indigenous language – Nòkwewahk. Nòkwewahk is the Algonquin word for sweetgrass, and this name provides a multitude of interwoven meaning, including a unique reminder for public servants to refresh and nourish themselves so that they can continue to transform relationships with Indigenous Peoples.[33] Whether expressed or implied, this tribunal is required to respect the treaty and reconciliation processes established through legislation and case law in order to uphold the Honour of the Crown.

[32] Canadian Nuclear Safety Commission, "Reconciliation" (25 September 2023), online: *Government of Canada* <https://www.cnsc-ccsn.gc.ca/eng/resources/aboriginal-consultation/reconciliation/>.

[33] Natural Resources Canada, "NRCan honours reconciliation as first federal department with a sector named in an Indigenous language" (24 May 2022), online: *Natural Resources Canada* <https://natural-resources.canada.ca/our-natural-resources/indigenous-peoples-and-natural-resources/federal-department-first-ever-give-its-own-sector-indigenous-name/24314>.

Part 2 – The Michi Saagiig Nations

Sovereignty and Treaties – A Nation-to-Nation Relationship

35. The Michi Saagiig Nations are signatories to several pre-confederation treaties, as well as the Williams Treaties of 1923, which after 90 years of dispute came to a final settlement agreement in 2018. These treaties, which cover the DNGS lands, form the relationship between us and Canada. They are legally binding and are living documents.

36. Many of the Michi Saagiig Nations are signatories to the Framework Agreement for First Nations Lands Management[34], the *First Nations Fiscal Management Act*[35], and other political Aboriginal arrangements all of which support our inherent right as self-governing authorities.

37. For several decades the Michi Saagiig Nations have lived with the DNGS while never being included in discussions, consultations or decisions on how it impacts our territories, our way of life, our citizens or our constitutionally protected Rights.

38. Our intent for signing the treaties was to document our relationship with the Crown and Settlers through shared lands and waters, underscore our sovereignty and right to self-determination, protect our values, culture, economy and spiritual way of life. Treaties convey our responsibilities to the Lands and Waters and are guided by our value of and relationship to Mother Earth.

39. Despite our Treaties, we were pushed out and illegally denied access to our lands favoured by Settlers. In 1923, the Crown imposed the Williams Treaties, which were implemented without negotiation and under the pretense of resolving long-standing grievances of the Michi Saagiig Anishnaabeg and Chippewa Nations regarding the government's failure to honour the pre-Confederation Treaties. The Williams Treaties of 1923 included a devastating 'basket clause' which denied Michi Saagiig Anishinaabeg and the Chippewa Nations their inherent Right to harvest, thereby truncating our economy, culture, spirituality and way of life.

40. As shared by Gitiga Migizi, Curve Lake First Nation Elder and knowledge keeper, in 2018:

> *The 1923 Williams Treaty was devastating to my people. I witnessed the trauma and the fear that was put on my people that were trying to live on the land. They lived daily watching over their backs and trying to maintain their lifestyle as Michi Saagiig Nishnaabeg. The government with the implementation of the "basket clause" was sneaky way to get rid of us as people who enjoyed this part of our great land. These old men I hung around with such as Madden and Jimkoons lived a life where they had to live by sneaking around and feeling like they were "poachers." They resorted to*

[34] Framework Agreement on First Nation Land Management, WESTBANK, MUSQUEAM, LHEIDLI T'ENNEH (formerly known as "LHEITLIT'EN"), N'QUATQUA, SQUAMISH, SIKSIKA, MUSKODAY, COWESSESS, OPASKWAYAK CREE, NIPISSING, MISSISSAUGAS OF SCUGOG ISLAND, CHIPPEWAS OF MNJIKANING, CHIPPEWAS OF GEORGINA ISLAND, SAINT MARY'S, as represented by their Chiefs and all other First Nations that have adhered to the Agreement and, as represented by the Minister of Indian Affairs and Northern Development, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, 12 February 1996.

[35] SC 2005, c 9.

catching other animals and harvesting those things that the government did not feel were part of those things they need to "protect" from us. These things included small animals, such as the groundhog and the porcupine, the muskrat for meat and other things were also eaten because we were forbidden from hunting game like deer (which was our staple) and we were also prohibited from fishing from October 15 to July 1 every year under provincial statutes.

This process was devastating to people that lived on the land. They faced starvation. But you know, I witnessed where they would circumvent some of these things brought by the government. Such as posting of permanent Game Wardens on our tri-lakes here – Buckhorn, Chemong and Pigeon. That way we were able to survive somehow but I see where it was an undignified way of living on the land, an adjustment that didn't need to be made. It was particularly difficult to obtain food in the winter time and since fishing was prohibited it became a time of great suffering. People had to run up an account at the Whetung General Store to them over until the muskrat season opened in April. So it was November to April that was quite difficult. Some people still had to fish and would do it at odd hours and would have to sneak around and not be seen. This is a very difficult thing to do in the winter time. As you know, anyone standing on the ice can be seen for miles and this is what the Game Warden would look out for and go out and chase my people. There were many stories told of how my people escaped the Game Warden. There were many stories of our people being caught, and going to court in Peterborough to be given fines for fishing out of season. Imagine the indignity on our people when they came in front of the Canadian courts. (Williams, D., 2018).

41. The Williams Treaties First Nations Settlement Agreement of 2018 re-affirmed the Michi Saagiig Nation's pre-existing right to freely fish, hunt, gather and harvest within portions of our territories. It acknowledged the collective right to practice Michi Saagiig culture, spirituality and way of life. Despite the recognition of our Rights and the Statement of Apology issued by Canada and Ontario, the original promises and intentions of the pre-Confederation Treaties continue to go unfulfilled, leaving us to fight for the preservation of our cultural, spiritual and economic longevity and way of life, including with this tribunal.

42. The Michi Saagiig Nations are the caretakers for and are in familial harmony with the lands and waters within our Territory in perpetuity, as it has been for thousands of years. We value all our relations and have a responsibility to ensure the health and integrity of our communities are maintained for generations to come.

43. As recorded by Curve Lake First Nation Elder and knowledge keeper, Gitiga Migizi (Doug Williams):

The traditional homelands of the Michi Saagiig encompass a vast area of what is now known as southern Ontario. The Michi Saagiig are known as "the people of the big river mouths" and were also known as the "Salmon People" who occupied and fished the north shore of Lake Ontario where

> *the various tributaries emptied into the lake. Their territories extended north into and beyond the Kawarthas as winter hunting grounds on which they would break off into smaller social groups for the season, hunting and trapping on these lands, then returning to the lakeshore in spring for the summer months.*
>
> *Michi Saagiig oral histories speak to their people being in this area of Ontario for thousands of years. These stories recount the "Old Ones" who spoke an ancient Algonquian dialect. The histories explain that the current Ojibwa phonology is the 5th transformation of this language, demonstrating a linguistic connection that spans back into deep time. The Michi Saagiig of today are the descendants of the ancient peoples who lived in Ontario during the Archaic and Paleo-Indian periods. They are the original inhabitants of southern Ontario, and they are still here today.*

44. The Michi Saagiig Anishinaabeg were given the responsibility by the Creator to protect *Shka-ki-mi-kwe* [Mother Earth] and her *Dooskweyaabin* [blood veins], the Waters. The Waters play a critical role in the lives of the Michi Saagiig Anishinaabeg. Women are the caretakers of the Waters. It is women's responsibility to ensure the Waters are protected and clean. The Michi Saagiig Anishinaabeg care for Mother Earth by engaging in a reciprocal relationship, taking only what is needed and offering ceremony as an act of gratitude. Water is life.

45. The Michi Saagiig Nations always consider the effects of decisions on the next seven generations just as our ancestors have done. Michi Saagiig Elders hold great knowledge of *Shka-ki-mi-kwe* [Mother Earth] that no one else possesses. Our knowledge is held in our hearts and minds to be passed by oral tradition for the next generations.

46. As Sovereign Nations, we have the right to protect and preserve our culture and spirituality, which are intrinsically linked to the Lands and Waters.

47. Our sovereignty includes Indigenous governance systems, laws, and the ability to fully participate in co-governance and management of our Territories and we are to be included in decisions regarding impacts from the DNGS PROL. Canada's colonial policies and practices continue to dismiss and supress our authority and right to self-determination, including making decisions about our Lands, Waters and Relations in relation to the DNGS.

Alderville First Nation (AFN)

48. Alderville has been home to the Mississauga Anishinabeg 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. The British, having lost the American colonies after 1783, were forced to relocate the soldiers and civilians that had been loyal to the King during the conflict. For this reason, the Bay of Quinte became one area of settlement for those who became known as the United Empire Loyalists. The Mississauga then were directly involved in early "land surrenders" along the St. Lawrence River and the Bay, allowing this resettlement to occur.

49. Along this corridor, the traditional economy of the Mississauga found itself under continued pressure for the next 40 years. The creation of Upper Canada and its colonization, and later the War of 1812, were events much larger than the Mississauga and other related groups could contain. Eventually, by the 1820s, they found themselves forced to adapt, and during this period a number converted to Christianity, primarily Methodism, from the Bay to the Western-end of Lake Ontario. By 1826, the Methodists at the Bay had convinced the Mississauga to take up the development of a mission and attempts were made at teaching the people a new agrarian economy. On tiny Grape Island, the people learned to read, write, and to worship in a different manner, becoming a major target group of the early assimilation policies of Canadian church and state.

50. While the people basically accepted the value of learning to read and write and adapting to a new economy, at the same time their sense of identity would not allow for a complete surrender of their cultural values and language. The Methodist experience among the Mississauga can best be described as a hybrid, or a mixed composition of traditional and western values and spiritual worldview.

51. The Mississauga actually maintained a hold on many of their traditions, including the Ojibway language, all through the early decades of the Methodist experience. In realizing that harsher policy was being designed to eradicate these traditions, a stronger resistance developed in the communities. For ensuing generations, this resistance toward their complete assimilation existed and it has become the basis upon which the cultural survival of the people has been maintained.

Curve Lake First Nation (CLFN)

52. 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. Although not as prominent, 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.

53. Our people are our most valuable resource. More specifically, the people of CLFN include members and non-members alike. Presently, our First Nation's registered membership is approximately 2,177 (1,409 off reserve and 768 on reserve). The total non-member population is approximately 600.

54. CLFN is located approximately 25 kms northeast of Peterborough, Ontario. The First Nation 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. The current government structure encompasses a large full time staff complement of 100 employees, in addition to other part-time and contract staff.

Hiawatha First Nation (HFN)

55. Hiawatha First Nation is located on the north shore of Rice Lake, east of the Otonabee River. It is found in Otonabee Township approximately 30 kilometres south of Peterborough. The First Nation consists of approximately 2145 acres of land of which 1523 acres are under certificates of possession.

56. Our values grow from the culture from which we are born into and live with, and our beliefs and attitudes emerge from our values. As Miississaugii people from the Mississauga Nation, we try to live a healthy way of life "Mino Bimaadizin" through the teachings passed down from ancestors. These teachings include 7 Grandfathers given to us by the Creator. This story has been passed down many generations.

57. The teaching goes…

> *The Creator gave the Seven Grandfathers, who are very wise, the responsibility to watch over the people. The grandfathers saw that the people were living a hard life. There was all kinds of sicknesses and bad things around. The eagle "Migizi" was told, "Go down there, look around and find out what is happening. Bring back someone who we can tell about what life should be, with the Anishinaabe" He left immediately and went to all places in the North, South, East and West. He could not find anyone. On his seventh try, while he was looking, he saw a baby. The grandfathers were happy with the choice made by the helper.*
>
> *He took the baby back to where the Grandfathers were sitting in a circle. He was still very small and still wrapped inside the cradleboard. One of the grandfathers looked at the baby very carefully. "This is the one. Migizi, pick up the baby. Take him all over; teach him carefully the way the Anishinaabe should lead their lives." The Migizi took him; they went around the earth.*
>
> *When they came back seven years later, the boy again saw the Grandfathers. He was already a young man. The Grandfathers noticed that this boy was very honest. He understood everything that was taught. One of the grandfathers took a drum and started singing. Each of the grandfathers gave the boy a teaching.*

a. "The **Wisdom "Nbwaakaawin**" Wisdom is given by the Creator to be used for the good of the people. In the Anishinaabemowin, this word expresses not only "wisdom," but also means "prudence," or "intelligence."

b. **Love "Zaagidiwin"** To know peace is to know Love. Love must be unconditional. When people are weak they need love the most.

c. **Respect "Mnaadendamowin"** To honor all creation is to have Respect. All of creation should be treated with respect. You must give respect if you wish to be respected.

d. **Bravery "Aakdehewin"** Bravery is to face the foe with integrity. In Anishinaabemowin, this word literally means "state of having a fearless heart." To do what is right even when the consequences are unpleasant.

e. **Honesty "Gwekwaadziwin"** Always be honest in word and action. Be honest first with yourself, and you will more easily be able to be honest with others. In Anishinaabemowin, this word can also mean "righteousness."

f. **Humility "Dbadendizwin"** Humility is to know yourself as a sacred part of Creation. In Anishinaabemowin, this word can also mean "compassion." You are equal to others, but you are not better.

Mississaugas of Scugog Island First Nation (MSIFN)

58. MSIFN is located on the shores of Lake Scugog in Durham, Ontario. MSIFN has a long history in this part of Ontario and is part of the Williams Treaties First Nations (WTFNs). The WTFNs' territory extends from the shore of Lake Ontario in the south, Georgian Bay in the west, the Ottawa Valley in the east, and as far north as the French River. Within these treaty territories, MSIFN's priority is the protection and preservation of the lands, waters, wildlife, and fisheries that we rely on.

59. The first Mississauga people settled in the basin of Lake Scugog around 1700. Game and fur animals, waterfowl and fish abounded, and wild rice grew in profusion in the shallow waters. Long before there was a Port Perry or even the province of Ontario, our people moved through this region – not as wanderers, but as caretakers and participants in an interconnected system.

60. Our ancestors travelled across what is now called southern Ontario, following the seasons and the cycles of the land. During the warmer months, we would gather along the north shore of Lake Ontario, fishing and gathering wild plants. In the fall and winter, we moved north of the Kawarthas – toward what is now known as Muskoka, Haliburton, even as far as North Bay or Ottawa – breaking into family groups to hunt, trap, and sustain our communities.

61. This pattern of movement wasn't aimless – it was highly organized, rooted in family, in clan, and in the dissemination of intergenerational Knowledge. We had – and still have – specific hunting and harvesting territories. These were carefully managed. Not owned the way settlers thought of land ownership, but respected, cared for, and passed down through generations.

62. Lake Scugog was – and remains – a central hub in this seasonal round. For example, the Scugog Carrying Place, which connected Lake Ontario to Port Perry and Lake Scugog, was a major travel route. It carried not only our people, but also trade – pre- and post-contact, culture, and ceremony.

63. But even in these early records, we see the pattern of disruption begin to form. In 1828, the construction of a dam in Lindsay raised the water levels of Lake Scugog dramatically. That action turned the township into an island and permanently altered the ecology of the area. Wild rice beds – vital to our diet and our economy – were flooded out. Cranberry bogs disappeared. Fish habitats changed.

64. The Michi Saagiig on Scugog Island were pushed out – again – temporarily relocated to Balsam Lake, to Coldwater, to Mud Lake. It wasn't until 1843 that our people, dissatisfied with the land quality at Balsam, returned to Scugog and purchased 800 acres of our own land near the north end of the island.

65. We did what we had to do to come home. That decision to return is a powerful part of our story. It wasn't just about geography. It was about identity. It was about holding onto our place, our language, our teachings.

66. As Michi Saagiig people, our relationships with the waters, and all living and non-living beings, are deeply woven into our Way of Doing and Knowing. These are not practices we adopted in recent times; they are traditions we have always carried forward, without interruption.

67. When we protect the lake, we honour our ancestors. When we educate others about the value of wetlands, we uphold our teachings. When we plan for the next seven generations, we act with love – for our children, our grandchildren, and for all those yet to come.

68. MSIFN's reserve community is about 37 km from the DNGS project and members have expressed direct concerns and uncertainty surrounding the safety, management, and security of the nuclear reactors and waste stored on site, as well as impacts to the environment. MSIFN is the only First Nation community located within the Ingestion Planning Zone (50 km) for distribution of potassium iodide pills in the event of an emergency at the PNGS which is approximately 40 kms from MSIFN.

69. Without ever providing consent, MSIFN must continue living with the risks associated with nuclear sites. Our traditional territory is where it is. Contamination of this area is an infringement which cannot be undone or satisfactorily accommodated. Nuclear safety is paramount to MSIFN. Nearly every aspect of the nuclear fuel lifecycle occurs within our territory, except for uranium mining. These post-colonial activities will continually impact on our community. It is the future generations who will bear this burden and MSIFN, along with the CNSC and OPG, has a legal obligation to ensure their safety.

70. MSIFN's Chief and Council, in conjunction with their teams, act as their community's regulatory body. The process MSIFN must undertake to discharge their legal obligations to their citizens and the WTFN community is complex and not something that the Crown can legally rush or disregard. UNDRIP exists to protect this, and our duty is to ensure it is upheld.

Part 3 – Issues

> Binnie J. — *The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.*[36]

71. In considering Binnie J's passage above, it is clear that the Crown must not mechanically apply terms to understand its obligations, but must purposefully examine the nature of the decision, the nature of the rights and the potential infringement as a starting point. Further, we submit that the proper way to understand the rights is through discussion with the Indigenous Rightsholder to better understand their perspective of the rights claimed and be able to put into context the infringement. It is only through such a purposeful and contextual analysis that progress towards reconciliation will occur.

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[36] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 1 [*Mikisew Cree, 2005*].

Understanding the DTCA – When Does it Arise?

72. Does the CNSC application process require a proper purposeful and contextual analysis of the DTCA including participation of the Michi Saagiig Nations?

73. What is the purpose of the DTCA? For us, the DTCA is about creating a mutually beneficial partnership between proponents, the Crown and the Michi Saagiig Nations. Viewed this way, the DTCA stops being a forced requirement and evolves into a process that proponents seek to undertake as it inevitably leads to a smoother and better project. Collaboration of knowledge and perspectives has led to the most progressive resource projects in Canada. This is the goal of reconciliation and the DTCA. This analysis is triggered when the government is requested to make a decision.

74. Reconciliation includes a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.[37]

75. The Crown's working foundation with Indigenous Nations are based on these principles and, as stated by Binnie J, reconciliation is the overarching principle governing this relationship. The DTCA is an important legal requirement that exists as one way to protect Indigenous Nations against the adverse decisions or actions of the Crown. Consideration of the principles of the Declaration and economic reconciliation are other available legal tools. Determining whether the Honour of the Crown has been upheld may start with consideration of DTCA fulfillment, but it is far from the end.

76. The Commission must determine whether the DTCA, UNDA and economic reconciliation were fulfilled when deciding if the Honour of the Crown has been upheld.

77. The Michi Saagiig Nations submit that:

    1. the DTCA was triggered but not yet fulfilled;
    2. the Declaration, including FPIC are legal obligations that were not adequately considered or upheld;
    3. there was no attempt at economic reconciliation and therefore;
    4. the Honour of the Crown is in disrepute.

Duty to Consult and Accommodate has been Triggered

78. While the duty to consult is not expressly set out in constitutional documents or in legislation, it is nonetheless a constitutional requirement. It finds its source in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous Peoples. The duty, which cannot be removed or restricted by legislation, is a common law requirement grounded in the Honour of the Crown and enshrined in section 35 of the

[37] Government of Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (last modified 1 September 2021), online: *Government of Canada* <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

Constitution Act, 1982.[38] The Haida test outlines the circumstances under which the Crown's duty to consult arises. This test is a three-part framework that requires: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[39]

79. The CNSC, as a Crown agency, is responsible for discharging the DTCA. The Crown may delegate procedural aspects of the duty to a proponent, but the legal obligation of fulfilling the DTCA and upholding the Honour of the Crown rests with the CNSC. Relying on submissions by OPG, the CNSC has wrongly determined that there is no DTCA for the DNGS PROL application.

80. *Delgamuukw* established that the duty to consult is engaged at a low threshold and that the extent of the duty owed will vary depending on the circumstances.[40] *Delgamuukw* also established that, in most cases, the duty to consult will be "significantly deeper than mere consultation."[41] In essence, the analysis should favour an obligation to consult and further reconciliation except in the clearest of cases.

81. The Commission must first determine if the Crown owed a duty to the Michi Saagiig Nations regarding OPG's PROL application prior to determining if it was fulfilled.

82. Determining whether there was a duty requires a two-part process:

    a. understanding how the duty is triggered under a renewal application; and

    b. determining if any of those triggering events are applicable.

83. The *Haida* test is nuanced when Crown conduct is considered a renewal of existing activities. There is an inherent assumption in a renewal that during the original licence application the DTCA was properly discharged. There is also a desire for maintaining certainty with respect to long-past decisions. However, this does not excuse the Crown from performing a detailed analysis.

84. If that process took place, the first determination is whether the contemplated Crown conduct is a *true extension* of existing activities and impacts. To make this determination, the courts have developed two clarifying questions:

    a. **does the activity create or have the potential to create a new or novel adverse impact on a protected right?**[42]**, or**

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[38] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*]; *R. v. Kapp*, [2008] 2 SCR 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550. In paragraph 61 of its decision in *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, the Supreme Court's first judgment on the duty to consult within the context of a modern treaty agreement, the Court held that while "[c]onsultation can be shaped by agreement of the parties, … the Crown cannot contract out of its duty of honourable dealing with Aboriginal people."

[39] *Haida*, *supra* note 38 at para 35.

[40] *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948 at para 66.

[41] *Delgamuukw*, *supra* note 12 at para 168.

[42] *Chaboyer v Saskatchewan Power Corporation*, 2025 SKCA 31 at para 153.[*Chaboyer*], *Chaboyer v Saskatchewan Power Corporation*, 2023 SKKB 62 at para 56. [*Chaboyer 2023*]

b. **are there new operations or new activities being proposed in the renewal application?**[43]

85. OPG states in its PROL application that the DNGS renewal is unlikely to cause new adverse impacts to the exercise of established or potential Indigenous and treaty rights. They based this conclusion on the following factors:

86. Continued operations…

1. will not change the DNGS site characterization;
2. will not result in new facilities at the site;
3. the site footprint will not expand; and
4. no new activities are planned.[44]

87. However, facts without context are not illuminative of the whole situation. The CNSC relied on OPG's own findings to determine there was no DTCA without either completing a full analysis which must include the Michi Saagiig Nations' perspective. OPG factors used to determine if the DTCA was triggered are insufficient and in the case of new activities or a changed context, are insufficient to complete the analysis.

88. The Michi Saagiig Nations submit that the DTCA was triggered for the following reasons:

1. **New title claim** to the lake and lakebed have been asserted;
2. **Expanded activities** which were not part of the original licence are included in this application;
3. **New acknowledgement** of section 35 Rights;
4. Determination that no DTCA exists based on an unreasonable interpretation of the test, is an **unjustified infringement and fails the *Sparrow* Test**[45]; and
5. The decision to issue the first ever 30-year licence is a **strategic higher-level decision**.

89. The Crown has also failed to apply UNDRIP, including FPIC. Taken together, the conduct of the Crown has failed to uphold the Honour of the Crown.

New Title Claim - Lake and Lakebed Title Assertion

90. The Lake Ontario lakebed at the DNGS is unceded territory of the Michi Saagiig Nations and any disruption of the lakebed by DNGS activities requires our consent. The Michi Saagiig Nations asserted this jurisdiction in 2024 and the CNSC became aware of this title claim during the DNNP Licence to Construct ("**DNNP LTC**") application process. This is a new title claim that was not considered during previous DNGS licencing phases. Once the Crown has knowledge of a potential title claim and is considering conduct adverse to

[43] *Chaboyer 2023* at para 66, upheld in *Chaboyer* at para 5, *Chaboyer 2023* at paras 57-59.
[44] Written submission from Ontario Power Generation Inc. in the Matter of Ontario Power Generation Inc. Application to renew power reactor operating licence for the Darlington Nuclear Generating Station. Commission Public Hearing Part 1, March 26, 2025. ("**OPG PROL Submission**")
[45] *Sparrow*, *supra* note 4.

that claim, the duty to consult is triggered. The law is very clear and firmly established on this point.[46]

91. The Commission noted in its Record of Proceeding that, as described in section 4.3.5.6 of CMD 24-H3.F, CNSC staff contacted Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), regarding whether the Williams Treaties Settlement Agreement addressed specific claims to the lakebed.[47] CIRNAC confirmed that the Williams Treaties Settlement Agreement did not address any potential claim of the Williams Treaties First Nations to lakebeds or water and any lakebed assertions. The Commission also understands that OPG is continuing discussions with the Michi Saagiig Nations and the Provincial Ministry of Natural Resources and Forestry to discuss different options to work to address the concerns regarding the potential purchase or use of an easement of the lakebed.[48]

92. A new title claim is a strong DTCA triggering event. The role of administrative bodies in relation to the DTCA was considered by the Court in *Gixtaala*:[49]

93. When a strong prima facie case for the [title] claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, in this type of case a deep consultative process might entail: the opportunity to make submissions; **formal participation in the decision-making process**; and, the provision of written reasons to show that Aboriginal concerns were considered and how those concerns were factored into the decision: *Haida Nation*, at paragraph 44. [emphasis added]

94. The Court in *Clyde River* found:[50]

> *Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).*

95. The new title claim changes the DTCA analysis and requires the CNSC to be flexible in its approach. The level of required consultation has evolved.

96. The Commission acknowledged OPG's commitment to continue engagement with the Michi Saagiig Nations regarding federal and provincial permits for the DNNP as well as planning for aquatic offsetting and terrestrial restoration based on our jurisdiction over the lake and lakebed. In section 5.1 of CMD 24-H3.1C, OPG reported that 18 permits were approved by federal and provincial regulators in 2024 and that each of those permits was discussed with the rights-holding Michi Saagiig Nations and adjusted based on their feedback.[51] OPG has established a monthly meeting with the Michi Saagiig Nations

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[46] *Haida*, *supra* note 38.
[47] Record of Decision DEC 24-H3, In the Matter of Ontario Power Generation Inc, Application for a Licence to Construct one BWRX-300 Reactor at the Darlington New Nuclear Project site, April 4, 2025 at para 413.
[48] *Ibid*.
[49] *Gitxaala Nation v Canada*, 2016 FCA 187 at para 174 [*Gitxaala*].
[50] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 20 [*Clyde River*].
[51] Supplementary Information, Written submission from Ontario Power Generation Inc in the Matter of the Ontario Power Generation Inc, Application for a licence to construct one BWRX-300 reactor at the Darlington New Nuclear Projects site, 2024-12-16, CMD 24-H3.IC.

regarding DNNP permitting requirements and has committed to continue engagement with us on permitting as the Project progresses.[52] OPG also proposed that implementation of WTFN's recommendation for an instrument to protect the beneficial actions areas may be achievable through a project agreement between OPG and the Michi Saagiig Nations.[53]

97. The Commission further notes that, in CMD 24-H3.G, CNSC staff proposed the following updated compliance verification criteria for licence condition 15.4:[54]

98. Each report shall include, at a minimum, and for each Indigenous Nation and community engaged:

99. An update on the status of and engagement conducted related to the aquatic offsetting, terrestrial restoration, beneficial action areas and provincial authorizations related to the potential issuance of a land use easement for the Lake Ontario lakebed.

100. The Commission respected our title claim over the lake and lakebed during the DNNP LTC application. The same respect, consultation and accommodation is required for the DNGS PROL application. We have a legal responsibility to the Water. We view any potential disruption to the lakebed as requiring the Michi Saagiig Nations' consent.

Expanded Activities – Medical Isotopes

101. The production of medically beneficial isotopes is an important consideration for renewing the PROL. We are in support of using the DNGS for this reason, but not without accommodating our rights. The DTCA is triggered if the renewal application includes activities that were not a part of the original or subsequent licences. The DNGS was originally licenced in the 1990s for the generation of electricity through four reactors.[55] DNGS started the refurbishment process in 2007. During that regulatory process, OPG was required to identify any potential gaps between Darlington's operations at that time and the newest modern safety standard and practices.[56] While a regulatory review on the newest safety standards took place, there was no review of the modern standards and practices or the law on Indigenous consultation. In 2015, during an active title claim, the CNSC issued a 10-year operating licence for the four reactors to continue generating electricity. Further, in 2021, the DNGS was licenced to produce medical isotopes, specifically molybdenum-99 (Mo-99). MSIFN has been intervening in isotope production proceedings with the CNSC and OPG to ensure economic reconciliation is part of the accommodations for issuing new activities.

102. The presence of increased activity in a renewal application triggers the DTCA. In the recent decision of *Cumberland House Cree Nation v Opaskwayak Cree Nation*, the Court used the consideration of new activities to determine the level of consultation.[57] The Court determined that a low level of consultation was required as there "were **no new operations**

[52] *Supra* note 47 at Para 414.
[53] *Ibid* at para 415.
[54] Supplementary Information, Written submission from Ontario Power Generation Inc in the Matter of the Ontario Power Generation Inc, Application for a licence to construct one BWRX-300 reactor at the Darlington New Nuclear Projects site, 2025-01-10, CMD 24-H3.G.
[55] Ontario Power Generation, "Darlington Nuclear Generating Station Refurbishment Project", online (pdf) at 123: *Ontario Power Generation* <https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_302en18.pdf>.
[56] *Ibid* at 124.
[57] *Cumberland House Cree Nation v Opaskwayak Cree Nation*, 2023 SKKB 62 [*Cumberland*].

or **new activities** being proposed."[58] This is distinguishable to the application at hand as the significant increase in medical isotope production is a proposed new activity.

103. In the present case, the license extension provides a springboard to enable additional activities and revenues. We submit that this alone is sufficient to ground a duty to consult.

104. Currently, there has been no formal DTCA or UNDRIP application regarding the expanded activity at the DNGS. OPG is now asking to considerably expand production without OPG or the Crown having fulfilled their initial DTCA obligations.

105. OPG's PROL application submission states:

> OPG plans to utilize Darlington NGS reactors to support the commercial production of medical and industrial isotopes, such as Cobalt-60 (Co-60), Molybdenum-99 (Mo-99), Yttrium-90 (Y-90) and Lutetium-177 (Lu-177).
>
> OPG has been producing Co-60, a critical isotope used in medical device sterilization and in food production, at Pickering NGS for decades. *With the recent amendment to the Darlington PROL, OPG will be **expanding** its Co-60 production capability using all four Darlington NGS units,* (emphasis added)…
>
> OPG and its strategic partners *are **planning** to harvest Mo-99, using a first-of-a-kind Target Delivery System (TDS),* in Darlington NGS Unit 2. This TDS system allows for target capsules to be inserted into the reactor core for irradiation to safely produce medical isotopes. These isotopes are used in medical procedures each year, helping to detect illnesses like cancer and heart disease.
>
> Additionally, *pending regulatory approval, the TDS on Darlington NGS Unit 2 will be used to produce Y-90 and Lu-177*. Y-90 and Lu-177 are medical isotopes used for radiation therapy and are proven to provide significant results in the treatment of specific cancers.
>
> With advancements in medical and industrial sectors, OPG is investing in innovative technologies *to expand* isotope production capabilities into valuable resources that benefit our society.[59]

106. These efforts are part of OPG's broader strategy to increase medical isotope production, supported by initiatives like the Central and Eastern Ontario Isotope Alliance (CEOIA) launched in May 2024, to double isotope output in the region over the next several years.

107. Accommodations for medical isotope production through economic reconciliation means have been successfully arranged with other First Nations. Preliminary discussions have taken place between our Michi Saagiig Nations and OPG, but after over a year, OPG has yet to bring a proposal forward.

108. Increasing the production of medical isotopes at the DNGS is a new proposed activity and has triggered the DTCA. We are asking the Commission to hold OPG to its obligations to consult and accommodate us.

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[58] *Cumberland*, *supra* note 57 at para 66; See also *Chaboyer 2025* at para 5.
[59] OPG PROL Submission pg. vi.

Potential New Adverse Impacts

109. Adverse impacts must be considered from the Indigenous Nation's perspective.[60] This includes impacts on harvesting areas, cultural and spirituality, as well as minor disturbances which, when looked at cumulatively over a large area, such as the restriction on the use of Lake Ontario due to nuclear projects, result in adverse impacts on treaty rights.[61] Our perspectives have not been obtained. It is imperative that the Crown seeks our perspective to understand if any potential new adverse impacts exist. Unfortunately, the Crown's determination was based on an erroneous analysis. To decide if there are new impacts requires a baseline to begin with.

110. For OPG to confidently claim that the 30-year renewal would not cause new adverse impacts assumes that the original adverse impacts are clearly understood. We would need a baseline from prior to the project's inception until today to be able to properly assess if a 30-year renewal will create new adverse impacts – either new impacts or further accumulation of existing impacts. We do not have that baseline information. Where there is ambiguity, the Court has held that the interpretation should be resolved in the Nations' favour.[62] Without meaningful consultation on the impacts of the renewal, OPG cannot claim that there are no new adverse impacts.

Lake Sturgeon – Endangered Species Found Near PNGS

111. Lake Sturgeon are true giants of the Great Lakes freshwater ecosystem. Growing up to two metres long and 100 kilos, these ancient dinosaurs can live for over 100 years. They were integral to the Michi Saagiig Nations' culture and diet. Unfortunately, they are now an endangered species facing imminent extinction. What a true gift it was when members of our team found a young Lake Sturgeon so close to the shores of Lake Ontario.

112. A 70 lbs Lake Sturgeon was found approximately one kilometre offshore from OPG's Pickering Nuclear Generating Station during an October 2024 nearshore/deepwater fish sampling activity. While unable to identify the gender, it was confirmed that the Lake Sturgeon had reached reproductive maturity. This is significant as it can contribute to the natural re-introduction of the species as sturgeons are an endangered species for the Great Lakes watershed. It was the first time the contractor responsible for the expedition had discovered a sturgeon in over 20 years of fish surveying.

113. Lake Sturgeon have been very important for Indigenous Peoples, including the Mississaugas. They have been used in ceremony, in celebration to connect communities, and they are one of the representative clan animals for the Anishinaabe. An endangered species is classified as facing imminent extinction making all revitalization efforts critically important.

114. It was previously believed that sturgeon would not live that close to shore. This discovery puts that theory in doubt. It is unclear what impact a 30-year PROL will have upon the potential success of revitalizing this culturally significant fish, and this goes to the heart of

[60] *Yahey v. British Columbia*, 2021 BCSC 1287 at paras 535, 537-538 [*Yahey*].
[61] *Yahey* at para 1075.
[62] *R. v. Badger*, [1996] 1 S.C.R 771 at para 9.

why OPG's claim that there is no potential for new adverse must fail. This finding has changed the consideration of impacts on the lakebed of the DNGS.

115. To date, the Michi Saagiig Nations have been part of very high-level discussions around the DNGS renewal process. There have been no scientific studies provided on what the potential impact of another 30 years of increased operation will be. As acknowledged in OPG's hearing submission, they are committed to an Indigenous Knowledge Study as part of the DNNP LTC conditions. But that study is in its infancy. As far as we have been provided, there are no Western or Indigenous scientific studies on what the impacts will be for this licence on the lake and fish, specifically the Lake Sturgeon.

116. OPG's 30-year licence application is the first of this length in Canada. We do not know what the effects of a licence of this length, which will result in approximately six decades of operation at DNGS, will have on the biosphere, the lake, and protected section 35 rights such as harvesting. Especially so when our knowledge of the natural environment is growing, and we have evidence of activities in the vicinity of endangered species of which we were previously unaware.

117. The cumulative impacts on the lake and the environment are also unknown. Nuclear production in Clarington and Durham Region must be considered as a whole to understand what the cumulative impacts may be.

Waste

118. DNGS produces low-level and intermediate-level radioactive waste which is stored at the Darlington Waste Management Facility. Nuclear waste is a significant and live concern for the Michi Saagiig Nations. A 30-year PROL renewal will generate more than double the present amount of nuclear waste.

119. Of further concern is the Nuclear Waste Management Organization's ("**NWMO**") commitment to a consent-based approach to finding a host to store the long-term nuclear waste.[63] If the NWMO is unsuccessful in finding a willing host, will the nuclear waste remain indefinitely on the DNGS site? The Michi Saagiig Nations will respect other Nations' self determination to decide if they will host nuclear waste. The reality is that the nuclear waste from operation to decommissioning may remain on our traditional lands indefinitely.

120. OPG's application for a precedent-setting 30 years creates new considerations and implications on the generation and storage of nuclear waste. The Michi Saagiig Nations' traditional lands cannot be moved, and the possibility of hazardous contamination is a fear our communities live with. Consultation with the Michi Saagiig Nations is required, and laudable commitments by the Crown must be more than empty words.

121. The Michi Saagiig Nations, specifically Curve Lake First Nation, was invited to observe environmental monitoring sampling, and we are aware that OPG is establishing a waste table. But as far as we have been told, there is no solution should the NWMO not be able to find a willing host, and the plan for waste remains unclear, making it difficult to know which potential adverse impacts are present. This makes the enterprise considerably riskier,

[63] Nuclear Waste Management Organization, "Guiding Principles", online: *Nuclear Waste Management Organization* <https://www.nwmo.ca/Site-selection/How-it-was-developed/Guiding-principles>.

and this risk is borne by Michi Saagiig Nations without being provided any input. Reducing the time for revisiting the licence is effectively the only mitigation strategy open to the Michi Saagiig Nations. Further, such risk mitigation poses no risk to OPG or NWMO's ultimate solution.

122. Of particular concern for the Michi Saagiig Nations is UNDRIP Article 29 which states that:

a. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

b. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

c. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.[64]

123. Article 29.2 specifically calls upon Canada to consult with and obtain the free, prior and informed consent of the Michi Saagiig Nations. However, there has been no consultation with the Michi Saagiig Nations regarding the nuclear waste which is produced and stored on their traditional territory in relation to the DNGS renewal application.

Generational Knowledge Gaps

124. The Michi Saagiig Nations lived with the infringement of their rights from the DNGS while believing that the infringement would end in 2025. A generation has lost access to their traditional lands, the ability for elders and knowledge keepers to pass down knowledge of the area and to teach cultural practices. Generational interruptions of knowledge and culture is a common assimilation practice for Indigenous Peoples in Canada. The impacts of cultural interruption through practices such as residential schools have been well documented.

125. The Michi Saagiig Nations' ways of knowing and beyond are grounded in the Seven Generations principle, with each generation lasting 20 years. The PROL of 20 years will remove a second generation from our traditional lands, and a 30-year PROL will impact a third generation. These are new impacts which we must contend with. As oral societies, we teach through our stories told on the land. Three generations deprived of the ability to be on the lands of the DNGS means this knowledge may be lost forever.

Strategic Higher-Level Decisions

126. If the Commission does not agree that a new title claim, new potential adverse impacts and new activities at the DNGS triggers the DTCA, then in the alternative, a request to issue a 30-year licence is a strategic higher-level decision which does trigger the DTCA. Strategic higher-level decisions are ones which affect the long-term direction and success

[64] *UNDRIP*, *supra* note 2.

of an organization, involve significant resource allocation, impact land and alignment with organizational and government goals. Decisions of this nature trigger the DTCA.

127. In *Rio Tinto*, the Supreme Court of Canada stated:

> [G]overnment action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)).[65] [emphasis added]

128. The Commission's decision to issue a historic DNGS 30-year PROL is a strategic, higher-level decision. This is a long-range planning decision which will set events in motion for the DNGS and beyond.[66] The outcome will significantly influence future decisions as OPG is preparing for a renewal application for the Pickering Nuclear Generating Station. The length of the permit is precedent setting, creates new impacts for this project, and impacts future licencing proceedings. The DTCA has been triggered.

Unjustified Infringement – Failure of the Sparrow Test

129. During the original DNGS application phases, the Crown was of the incorrect opinion that the Michi Saagiig Nations' rights had been extinguished. This opinion was supported by a string of *R. v Howard*[67] cases which made their way to the Supreme Court and in which the Courts wrongly found that the 1923 Williams Treaties extinguished our rights.

130. This position was corrected during subsequent litigation, colloquially known as the Alderville litigation, which went to trial during the DNGS refurbishment and subsequently was settled. The Nations argued that the Williams Treaty First Nations' pre-Confederation treaties signed with the Crown protected harvesting rights and those rights were not affected by the Williams Treaties of 1923 as previously decided. Canada and Ontario

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[65] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 44 [*Rio Tinto*].

[66] *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2014 SKQB 69 [*Buffalo River*]. The judge determined at paras 31, 36-37 that the Crown decision was not a strategic higher-level decision as it involved no strategic thinking or planning. The decision at hand is distinguishable as it is in line with what is considered in *Rio Tinto* and goes well beyond the strategic considerations in *Buffalo River*.

[67] *R. v Howard*, [1994] 2 S.C.R. 299.

agreed, and negotiated a settlement recognizing the pre-existing treaty harvesting rights of the Michi Saagiig Nations members to hunt, trap, fish and gather.[68]

131. The implication of this finding is that during the original and subsequent DNGS licencing applications, the Crown proceeded as if the Nations did not have rights. There was therefore no consultation and no accommodations made. This is the first time the Crown is contemplating conduct at the DNGS while having real, irrefutable knowledge of our constitutionally protected rights.

132. In our view, the formal recognition of our rights creates an obligation for the Crown to consider its decisions within these recently recognized rights frameworks. It can be the only logical conclusion. If the recognition of rights where rights had been viewed as extinguished does not trigger a new obligation, we do not know when such obligations could possibly arise.

133. In certain circumstances, it may be reasonable to conclude that to re-consult the same communities regarding the same project that results in the same impacts is illogical. In *Fond du Lac Denesuline*[69], the Court found that the duty to consult was not triggered as the licence had been issued 10 years earlier and the renewal was for a further eight years. The Nations in *Fond du Lac Denesuline* had been meaningfully consulted and a further eight years meant the chances of new adverse impacts were low. Our situation is distinguishable in that we never had meaningful consultation and accommodation and the time span of 60 years is considerably different than 18 years.

134. As was observed by the Supreme Court in *Mikisew Cree*[70], "[t]he determination of the content of the duty to consult will, as *Haida* suggests, be governed by context". In *Mikisew Cree*, the Supreme Court found that modern settlements are an important context that informs the DTCA.

135. Determining that the DTCA is not triggered because a project is an extension must not create indefinite permission to infringe constitutionally protected rights unabated. That is not minimally impairing and is a fatal flaw in the law. The Supreme Court established the legal test to justify infringement of section 35 rights in *Sparrow*.[71]

136. The *Sparrow* test comprises two steps:

1. Does the law in question have the effect of interfering with existing Aboriginal rights; and
2. Can the Crown justify the infringement by showing that:
    i. The law has a valid objective
    ii. The infringement is justified in light of the principles of the honour of the Crown. This requires an analysis of whether the infringement necessary to

[68] Indigenous Affairs, "Negotiations with the Williams Treaties First Nations Toward a Negotiated Resolution of the Alderville Litigation" (27 March 2017), online: *Indigenous Affairs* <*https*://news.ontario.ca/en/backgrounder/44119/negotiations-with-the-williams-treaties-first-nations-toward-a-negotiated-resolution-of-the-alderville-litigation>.
[69] *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73 [*Fond du Lac Denesuline*].
[70] *Mikisew Cree, 2005*, supra note 36 at para 63.
[71] *Sparrow*, *supra* note 4.

achieve the Crown's objective, whether the law is minimally impairing on the protected right, whether fair compensation was made available or whether the Indigenous Nation was consulted with respect to the regulatory measures.

137. The law in question is the legal test for determining the existence of the DTCA is a project renewal. The DTCA is a duty owed to Indigenous communities to ensure their rights are protected. If the Crown refuses to consult and accommodate Indigenous communities because a project is deemed an extension while section 35 rights are unreasonably infringed, either due to length of time or seriousness of infringement, then the Crown fails the second part of the *Sparrow* test. A generous, purposive approach must be brought to the duty to consult, not a rigid, formulaic application.[72]

138. In *Kebaowek*, Justice Blackhawk referred to the justified infringement test:

> *Additionally, the Supreme Court in Tsilhqot'in Nation reaffirmed the test for a justified infringement of section 35 rights. To justify an infringement of a section 35 right, the Crown must demonstrate: "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group".73 [citations omitted]*

139. It is difficult to prove that the Crown discharged its DTCA when it has never undergone meaningful consultation or accommodations regarding the DNGS. A line must be drawn on DTCA project extension exemptions in that the exemption should only apply when the Crown, during the original contemplated conduct, provided meaningful consultation and accommodation with impacted communities. While the common states that the DTCA is not the vehicle to accommodate historical harms, at the same time it cannot be the vehicle to permit justified harms.

140. The classification as a renewal should not create a backdoor that permits the Crown to avoid its legal obligations. The case law is also clear that document interpretation which creates ambiguity must be resolved in favour of the Indigenous group.[74] While the Michi Saagiig Nations claim that the DTCA has been triggered, if the Commissioner finds that the answer is unclear, it must be resolved in favour of the Michi Saagiig Nations. To decide otherwise is a form of sharp dealing and a failure of the Crown's fiduciary obligations.

Economic Reconciliation

141. The rights associated with land title arise once title has been established. The Supreme Court in Tsilhqot'in clearly stated that title had to either be agreed to or declared by the court for the title holders' rights to take effect.[75] However, where there is a strong title

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[72] *Rio Tinto*, supra note 66
[73] *Kebaowek, supra* note 20 at para 117, quoting *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].
[74] *R. v. Desautel*, 2021 SCC 17 (CanLII), [2021] 1 SCR 533, *R. v. Badger*, [1996] 1 SCR 771 at para 41.
[75] *Tsilhqot'in*, supra note 74 at para 91.

claim, the British Columbia Supreme Court has held that the court must take care to preserve the interest in the land pending the final resolution of the claim.[76]

The Right to the Economic Benefits to the Land

142. Economic reconciliation requires the development of a renewed fiscal and economic relationship.[77] This renewed relationship would ensure that Indigenous Peoples have fair access to land and resources, build fiscal capacity, support Indigenous economies and the Canadian economy, and facilitate wealth-sharing from the development of the land.

143. Wealth-sharing is not simply an objective of economic reconciliation, but a right Indigenous Peoples have in virtue of the title they hold in the land. The Supreme Court of Canada in *Delgamuukw*[78] and *Tsilhqot'in*[79] reviewed the rights associated with Aboriginal title. Title holders have the right to the exclusive use and occupation of the land for a "variety of purposes"[80], and the right to profit from the economic development of the land.[81] The Supreme Court of Canada has also drawn an analogy between Aboriginal title and the fee simple, noting that title holders have similar rights to decide how the land will be used; to enjoy, possess, and occupy the land; and have a right to the economic benefits of the land.[82]

144. The continued operation of DNGS without consideration for the Michi Saagiig Nations' title claim to the lake and the lakebed would breach the principles of economic reconciliation. To take meaningful action in furtherance of reconciliation, the Commission should not renew the licence without consideration of the Michi Saagiig Nations' rights to the land.

145. In 2024, DNGS had an annual net income of $988 million.[83] Given the Michi Saagiig Nations' rights to the economic developments arising from the development of the land, they have a right to share in that income.

146. The economic benefits of the land are not restricted to the financial benefits resulting from the operation of the DNGS. Economic benefits have been construed to include both financial and employment benefits.[84] Further, economic reconciliation emphasizes the development of a partnership with Indigenous communities, leading to Indigenous Peoples holding equity in these projects.[85]

147. The Commission should consider and apply the principles of economic reconciliation in their decision as to the renewal of the licence. Meaningful action in respect of the

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[76] *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 458 at para 25 [*Kwikwetlem*].
[77] Government of Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples", *supra* note 37.
[78] *Delgamuukw*, *supra* note 12.
[79] *Tsilhqot'in*, *supra* note 74.
[80] *Delgamuukw*, *supra* note 12 at paras 117, 166.
[81] *Tsilhqot'in*, *supra* note 74 at para 70; *Guerin*, *supra* note 10 at 382.
[82] *Tsilhqot'in*, *supra* note 74 at para 73.
[83] Ontario Power Generation, "OPG reports 2024 financial results" (4 March 2025), online (media release): <https://www.opg.com/release/opg-reports-2024-financial-results/>.
[84] *Sumitomo Canada Limited v. Minto Metals Corp.*, 2024 YKSC 28 at para 41.
[85] Sara Beyer, "Sharing Prosperity: An Introduction to Building Relationships for Economic Reconciliation in Ontario" online at 26: *Ontario Chamber of Commerce* <https://occ.ca/wp-content/uploads/Sharing-Prosperity-An-Introduction-to-Building-Relationships-for-Economic-Reconciliation-in-Ontario.pdf >.

commitment to economic reconciliation should involve the Michi Saagiig Nations in the project so that they can not only realize the financial benefits, but also develop relationships for the benefit of both the Michi Saagiig Nations and OPG.

148. The Commission's decision to issue a 30-year licence for the continued operation of the DNGS without the Michi Saagiig Nations' involvement would be a breach of the commitment to economic reconciliation and of the Michi Saagiig Nations' right to the economic benefits of the land. While the objectives of providing an additional supply of energy are understandable, they must be implemented in a manner consistent with economic reconciliation.

The Duty to Not Encumber the Land for Successive Generations

149. In line with their commitment to economic reconciliation and other rights held by the Michi Saagiig Nations, the Crown cannot encumber the land in a manner that would prevent successive generations from using and enjoying the land. The Supreme Court in Tsilhqot'in stated:

> *[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.*[86]

150. Title is held collectively for successive generations. The Crown has an obligation to not encumber that land in a way that would substantially deprive successive generations from being able to use and enjoy the land. While substantial deprivation has yet to be defined, the renewal of a licence for 30 years on the land and lake that the Michi Saagiig Nations assert title over would certainly impact future generations.

151. However, the impact of a 30-year licence is generally not known. While there are 30-year licences issued internationally, they have been issued recently and it is unclear what the impact of that length of licence in our Territory may be on the biosphere, lake, and on our protected section 35 rights.

152. Furthermore, there is already evidence of adverse impacts on the biosphere. Generated waste from the DNGS will more than double and endangered species are being found closer to the DNGS. The impact of the licence extension on a species integral to the Michi Saagiig Nations is concerning.

153. To issue a licence renewal for the continued operations of DNGS would not only be an unprecedented decision but would also breach the right of the Michi Saagiig Nations.

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[86] *Tsilhqot'in, supra* note 74 at para 74.

United Nations Declaration on the Rights of Indigenous Peoples

UNDA, UNDRIP and FPIC

154. UNDA came into force in June 2021. UNDA brings the intent and objectives of the Declaration into Canadian law and provides a statutory foundation for the proper implementation and operationalizing of UNDRIP.[87] UNDA also provides a framework to advance implementation of the Declaration at the federal level.[88]

155. The practical implications of UNDA in the energy sector have been addressed through legislation, such as the Impact Assessment Act[89] and most recently in the Kebaowek decision.[90] If there is no legislation that explicitly deals with the Declaration, or if the law is perceived as not being aligned with the Declaration, there is no automatic repeal nor does it create any new obligations or regulatory requirements. Regardless of whether a specific reference to the Declaration is made in legislation, Canada continues to have a constitutional duty to uphold it, including operationalizing FPIC. This requires the Crown to fill legislative gaps with different processes or new creative ways to ensure meaningful and effective participation of Indigenous rights holders in decision-making.[91]

156. Kebaowek presented the first time UNDRIP and FPIC were considered by the federal court and provides guidance to administrative tribunals. Justice Blackhawk found that the Declaration and FPIC are required considerations and while they intersect with the DTCA they are stand alone requirement.

157. The federal court in Kebaowek clarified that the federal government is legally required to apply the Declaration, including FPIC, when it is pursuing action which may infringe Indigenous rights protected by UNDRIP.[92] UNDA is the legal instrument enforcing UNDRIP in Canada. While consideration of UNDRIP may be part of the formal DTCA, it is not a requirement that the DTCA must be triggered in order for UNDRIP to apply.

158. In *Kebaowek*, Justice Blackhawk made the important distinction:

> *Turning back to the issues in this application, while the triggers for FPIC and the DTCA are similar, there are important distinctions between the two. First, the international jurisprudence and commentary indicate that FPIC is "a single universal 'standard'," whereas the DTCA lies along a spectrum based on the strength of the section 35 right asserted, or established, and the nature of the proposed infringement of that right (Boutilier at p 6).*[93]

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[87] *UNDA*, *supra* note 3.

[88] Department of Justice Canada, "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*" (10 December 2021), online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/declaration/about-apropos.html>.

[89] S.C. 2019, c. 28, s. 1.

[90] *Kebaowek*, *supra* note 20.

[91] Department of Justice Canada, "Backgrounder – Natural Resource Sector" (19 April 4 2022), online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/declaration/bgnrcan-bgrncan.html>.

[92] *Kebaowek*, *supra* note 20.

[93] *Kebaowek*, *supra* note 20 at para 112.

159. There is also a fundamental difference between the justified infringement of section 35 rights compared to UNDRIP rights. Justice Blackhawk stated that the framework for infringing section 35 rights:

> …*"infuses an obligation of proportionality into the justification process" (Tsilhqot'in Nation at para 87). Implicit in this obligation and the Crown's fiduciary duty is the requirements that there be a "rational connection" between the infringement and the proposed objective; that the infringement of rights is as minimal as possible; and that the infringement of the rights is proportional to the perceived benefit (Tsilhqot'in Nation at para 87).*[94]

160. Justice Blackhawk also made the comparison to infringement of UNDRIP rights:

> *Article 46(2) is clear that "[t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations." The justification for the limitation of UNDRIP rights appears to be more stringent, as Article 46(2) states that any limitation on a right must be:*
>
> 1. *In accordance with international human rights obligations;*
> 2. *Non-discriminatory; and*
> 3. *Necessary only for the purpose of obtaining recognition and respect for the rights and freedoms of others and meeting the just and most compelling requirements of a democratic society.*[95]

161. Justice Blackhawk went on to differentiate between the two different consultation frameworks:

> *[127] I agree with Kebaowek that the frameworks are similar, but as discussed previously, there are important distinctions between FPIC and the DTCA. Further, as noted by the Honourable Jody Wilson-Raybould, former Minister of Justice and Attorney General of Canada, "[w]ords have meaning. We live in a time where language is often appropriated and misused, co-opted and twisted – made to stand for something it is not" [citation omitted].*
>
> *[128] In my opinion, Canada's adoption of the UNDRIP into Canadian law via the UNDA must mean more than a status quo application of the section 35 framework. The UNDRIP must be interpreted in the ordinary sense of the words set out. The words of the UNDRIP and the resulting commentary regarding its development and interpretation must be used to guide our interpretation of the section 35 framework, and in this application, how the UNDRIP is to be*

[94] *Kebaowek*, *supra* note 20 at para 117, citing *Tsilhqot'in*, *supra* note 74.
[95] *Kebaowek*, *supra* note 20 at para 118.

used to interpret the Crown's analysis of the duty to consult and accommodate.[96]

162. The Commissioners support that UNDRIP and FPIC are legal requirements as stated in the Record of Decision for the DNNP LTC application.[97] Unfortunately, the DNNP LTC application decision seemed to have missed the important distinction Justice Blackhawk laid out between the DTCA and the rights protected by UNDRIP and have conflated the two consultation approaches. They have stated that UNDRIP and its articles ought to be used to aid in the interpretation of the scope of Section 35 rights and of the duty to consult and accommodate such rights.[98] However, a very important clarification is required. The obligation to consider and apply UNDRIP and its articles is not reliant on the triggering of the DTCA. Consideration of UNDRIP is a stand-alone obligation.

163. FPIC was discussed in the Reference to the Court of Appeal for Quebec.[99] Justice Mainville of the QCCA stated:

> *In July 2017, the federal government (under the aegis of the then Minister of Justice, the Honourable Jody Wilson-Raybould) announced a set of principles designed to govern its relationship with Aboriginal peoples from that point forward. The policy that followed in 2018 did more than merely strengthen the 1995 policy, refashioning it on the basis of s. 35 of the Constitution Act, 1982 and the UN Declaration. The ten principles affirmed therein "are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with indigenous peoples". These principles, which are set out here, together with some of their accompanying comments, are based on recognition of the right to self-determination of Aboriginal peoples, which becomes the foundation for government-Aboriginal relations:*
>
> *The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.*
>
> *[…]*
>
> *The Government of Canada recognizes that meaningful engagement with indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.*[100] *[emphasis in original]*

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[96] *Kebaowek*, *supra* note 20 at paras 127-128

[97] *Supra* note 47 at para 374.

[98] *Ibid* at para 374.

[99] *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 [*Reference to the Court of Appeal of Quebec, 2022*], rev'd in part on other grounds 2024 SCC 5 [*Reference to the Court of Appeal for Quebec, 2024*].

[100] *Reference to the Court of Appeal for Quebec, 2022*, *supra* note 100 at para 193.

164. On slide 30 of the CNSC DNNP LTC Part 1 Hearing submission, the CNSC characterized the CNSC's approach to consultation as being mindful of the articles in the Declaration including FPIC.[101] Being mindful of the Declaration is not the required standard. The CNSC must recognize and respond accordingly to the SCC's interpretation of the UNDA as a pre-existing set of rights that must continue to animate Canadian law. Kebaowek affirms this requirement. We are concerned that current CNSC decisions have not been informed by the Declaration as no analysis or application of the Declaration has taken place.

165. UNDRIP has also been called an international "obligation" by the Federal Court, one which creates a presumption that Canadian legislation is enacted in conformity to it.[102] The Canadian Human Rights Tribunal relied on UNDRIP to find that equality is to be substantive and not merely formal.[103]

166. The Quebec courts have taken a much more vigorous approach to the use of UNDRIP as an interpretive aid. The Quebec Court of Appeal confirmed that UNDRIP is nevertheless a universal human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law.[104] The Court of Appeal went on to find that while UNDRIP is non-binding internationally, it "has been implemented as part of the federal normative order" via the UNDA.[105] On appeal, the Supreme Court of Canada similarly observed that "…the Declaration has been incorporated into the country's positive law by the [UNDA], s. 4(a)."[106] While the QCCA did not elaborate in detail on what it meant by UNDRIP being "implemented as part of the federal normative order", it did rely on this conclusion to bolster and confirm its interpretation of s. 35 of the Constitution Act, 1982 as recognizing and affirming the right of Aboriginal peoples to regulate child and family services, which the Court of Appeal considered to be "entirely consistent with the principles set out in [UNDRIP]".[107]

167. Following the QCCA decision, the Quebec Superior Court went even further. After reviewing the history of Canada's relationship with UNDRIP, the Court concluded that "UNDRIP, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)".[108] The practical effect of this would be that when interpreting s. 35(1), courts should generally presume that the protections it offers are at least as great as the rights set out under UNDRIP.[109]

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[101] Canadian Nuclear Safety Commission October 2nd, 2024, Hearing Part I Submissions Download #2 at 42:02.
[102] *Simon v. Canada (Attorney General)*, 2013 FC 1117 at para 121 affirmed on other grounds 2015 FCA 18.
[103] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 453.
[104] *Reference to the Court of Appeal for Quebec, 2022*, *supra* note 100 at para 507.
[105] *Reference to the Court of Appeal for Quebec, 2022*, *supra* note 100 at para 512.
[106] *Reference to the Court of Appeal for Quebec, 2024*, *supra* note 100 at para 4; See also *Reference to the Court of Appeal for Quebec, 2024*, *supra* note 100 at para 15.
[107] *Reference to the Court of Appeal for Quebec, 2022*, *supra* note 100 at para 61.
[108] *R. c. Montour*, 2023 QCCS 4154 at paras 1175-1201.
[109] Jack Woodward "Aboriginal Law in Canada" Chp 2: Sources of International Law in Canada ss 2:38 United Nations Declaration on the Rights of Indigenous Peoples para 2.1085.

168. The Crown has failed to consider the application of UNDRIP and FPIC and this too has cast doubt on the Honour of the Crown.

UNDA Action Plan

169. The CNSC continues to acknowledge its commitment to consultation and cooperation with Indigenous partners, as well as aligning the implementation of the UNDA Action Plan, particularly FPIC on natural resource projects, which includes both existing and proposed nuclear initiatives. Nevertheless, the ongoing absence of FPIC for project activities is notable in this application. The Michi Saagiig Nations are calling on the Commission to require the CNSC to enact concrete measures that implement the UNDA Action Plan.

170. As part of the TRC's Calls to Action, the UNDA Action Plan was established by the federal government in 2023. The UNDA Action Plan speaks to collaborative decision making, supporting Indigenous leadership in conservation, respect for Indigenous rights, culture and jurisdiction weaving Indigenous science with western science to inform decision-making, consideration of health, social and economic factors, including impacts to women, youth, and elders, among other things.[110]

171. The UNDA Action Plan specifically addresses NRCan and tasked the Canadian Energy Regulator to complete a number of action items, many of which the CNSC can easily adopt:

    1. Develop regulations respecting the Minister of NRCan's power to enter into arrangements enabling Indigenous governing bodies to exercise specific powers, duties and functions under the Canadian Energy Regulator Act.
    2. Incorporates specific localized knowledge held by Indigenous peoples, as well as Indigenous laws, policies, practices, protocols, and knowledge.
    3. Strengthens measures to prevent and address impacts to Indigenous rights and interests, including in relation to heritage resources and sites of Indigenous significance.
    4. Develop a systemic model to enhance Indigenous peoples' involvement in compliance and oversight over the lifecycle (design, construction, operation and abandonment) of CER-regulated infrastructure. The model should integrate learnings from existing structures and relationships.
    5. Consult and cooperate to identify and take the measures needed to support Indigenous governing bodies, and/or the potential establishment of new Indigenous decision-making institutions, to exercise regulatory authority on projects and matters regulated by the Canada Energy Regulator, including:
    6. Co-develop with First Nation, Métis and Inuit communities, governments and organizations and relevant federal department and regulators the mandate of such bodies or institutions, as well as the mechanisms required for empowering them with certain regulatory authorities.
    7. Identify the actions and allocate the resources required to further develop capacity and expertise for the exercise of regulatory authority by such bodies or institutions.

[110] *UNDA*, *supra* note 3.

172. This work could lead to other federal departments, regulators or institutions, similarly working in consultation and cooperation with First Nations, Métis and Inuit communities, governments and organizations, to:

    1. Enhance the participation of Indigenous peoples.
    2. Set the measures that could enable them to exercise regulatory authority, in respect of federally regulated natural resource projects.

173. CNSC has the authority to follow the CER's precedent and enable Indigenous governing bodies to exercise regulatory authority in conjunction with the nuclear decisions and matters given that the Commission has existing powers to (i) enter into arrangements, (ii) establish advisory, standing and other committees, and (iii) certify persons to carry out duties under the NSCA. Furthermore, the Commission has the authority to issue, renew, suspend in whole or in part, amend, revoke, replace or redetermine a licence to carry out any activity described in the NSCA. The authority to create an IAC already exists in the NSCA.

Honour of the Crown

The Honour of the Crown is a Canadian constitutional principle that governs the relationship between the Crown and Indigenous Peoples. It arises from the Crown's assertion of sovereignty over Indigenous Peoples and its control over lands and resources that were previously under Indigenous control. Section 35 ensures the Crown's interactions with Indigenous Peoples are conducted with integrity and promote working together towards solutions as a preference to litigation.[111] It is intended to facilitate reconciliation between Indigenous societies and the Crown, and it imposes obligations on the Crown to act honourably in its dealings with Indigenous Peoples.[112]

174. The Honour of the Crown influences how obligations must be fulfilled. It gives rise to various duties, including the DTCA, but goes beyond the DTCA. It governs how treaty promises are fulfilled and requires the government to take a broad purposive approach and to act diligently to fulfill promises made to Indigenous communities especially when dealing with constitutional rights.

175. Determining that there was no DTCA and ignoring the UNDA, the Declaration and economic reconciliation calls the Honour of the Crown into question. Consultation is about the relationship between the Crown and Indigenous partners. The CNSC and OPG committed to this relationship during the LTC hearing and the Commissioners relied upon these promises to determine that the DTCA for the LTC was fulfilled. This relationship does not stop because a project is, in the eyes of the proponents, an extension. Either they believe in the relationship, or they do not. It cannot be one of convenience.

176. It is illogical that the Commissioners require consultation and accommodation on the DNNP LTC for items such as ecological offsetting and the lakebed jurisdiction but then determine consideration for those same types of infringements stop at an imaginary line

[111] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27.
[112] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.

between the DNNP and the DNGS. The DNGS infringes the Michi Saagiig Nations' rights, as does the DNNP, yet arbitrary timelines and interpretations result in different outcomes. This is not honourable.

177. Federal guideline principle #4 recommends moving away from a project-by-project approach.[113] "The overall relationship between the Crown and an Aboriginal group will influence, and be influenced, by how consultation and accommodation issues are being addressed by each department and agency … Managers must keep an eye on the "big picture" as their department's handling of a consultation file may strengthen or weaken Canada's relationship with a particular First Nation, Métis or Inuit group, thereby influencing not only their own department's or agency's future dealings with that community, but also the future dealings of other departments and agencies."[114]

178. OPG included its commitment to engaging with Indigenous Nations regarding nuclear operations in its renewal application submission. In its introduction on page viii OPG states:[115]

> *OPG recognizes that meaningful engagement begins with relationship-building, the establishment of trust and is committed to respect, openness and transparency in building these relationships. In the context of this specific application, OPG is committed to building an engagement plan with Indigenous Nations and communities to increase collaboration and deepen engagement with respect to the Darlington NGS. OPG's intent is to develop a framework for both the licence renewal application process as well as ongoing engagement after a licensing decision is made. OPG is steadfast in its commitment to supporting meaningful engagement during and after the licensing application process and will work in collaboration with Indigenous Nations and communities to build the engagement plans.*[116]

179. Based upon the commitments above, the Michi Saagiig Nations reasonably concluded that OPG would find that it owed a duty to consult. There is no other interpretation for these statements.

180. As was the case with Kebaowek First Nation in Kebaowek, the Michi Saagiig Nations are seeking a right to a process that upholds treaty obligations and the Honour of the Crown. This process has been denied, and the Crown has failed in discharging its fiduciary duty to the Michi Saagiig Nations.

Minimal Consultation

181. We commend OPG for their commitment to engagement across multiple projects, including the DNGS, as evidenced by their pledge to develop an engagement plan (OPG Submission, page viii). However, the CNSC's project-by-project regulatory approach, with inconsistent consultation expectations, strains our capacity and undermines the federal

[113] *Supra* note 27.
[114] *Supra* note 27 at Principle 4.
[115] OPG PROL Submission.
[116] *Supra* note 114.

government's Principles to reconciliation.[117] We propose that the CNSC adopt a holistic consultation framework, co-developed with the Michi Saagiig Nations, to streamline engagement and ensure our governance processes are respected across all nuclear projects in our territory. As treaty partners, we want to create a process that ensures our governments are integral to the projects as a whole. This requires standard rules of engagement and consistent consideration of our rights and respect as sovereign governments.

182. The federal government states:

> *There is considerable recognition that effective consultation and cooperation processes require adequate timeframes through appropriate channels, in addition to adequate and timely funding for Indigenous partners. A recurrent consideration is potential 'consultation fatigue' and the need for greater collaboration across and between federal departments and agencies, including with respect to consultation and cooperation on legislative and regulatory measures.*[118]

183. Each Michi Saagiig Nation has its own laws, which are rooted in its knowledge systems and ways of being. Each Michi Saagiig Nation is self-governed and has its own internal protocols and processes which must be respected. Michi Saagiig Chiefs and Councils are directly responsible for all aspects of life for the citizens of each Michi Saagiig Nation. There are formal processes which must be followed, similar to any other government. This includes holding community meetings to inform and gather feedback, seeking guidance from elders, and ensuring that collective Michi Saagiig rights are protected. Each matter before the Michi Saagiig Chiefs and Councils will have its own timeline and process. Collaboration with OPG and other levels of government are valued, however, the Michi Saagiig process cannot be disregarded.

184. Further, consultation and engagement activities have been fraught with time and capacity constraints which continue to go unaccounted for and not meaningfully addressed. The DNGS is all but one of the dozens of nuclear activities which are taking place simultaneously within Michi Saagiig Nations Territory. Nuclear activities in Michi Saagiig Nations Territory include the DNNP, PNGS, DNGS and Wesleyville.[119] The DNGS PROL hearing is but one of dozens of hearings and other regulatory processes that have been simultaneously taking place over the last several years. And this is only just the nuclear sector.

185. Consultation requests to our communities are overwhelming. The Michi Saagiig Nations recognize the efforts of the CNSC and OPG to provide funding to support participation, but it must be acknowledged that this funding model does not provide consistent reliable

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[117] *Supra* note 27.

[118] Department of Justice Canada, "Second annual progress report on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act" (July 2023), online at 2: *Department of Justice Canada* <https://www.justice.gc.ca/eng/declaration/report-rapport/2023/p2.html>.

[119] Government of Canada, "Independent Environmental Monitoring Program: Darlington nuclear generating site" (last modified 15 May 2024), online: *Government of Canada* <https://www.cnsc-ccsn.gc.ca/eng/resources/maps-of-nuclear-facilities/iemp/darlington/>.

funding aimed at leveling the playing field to enable active involvement in decision-making, nor is it scoped to the scale of consultation required for FPIC or the DTCA. The current funding model may provide an avenue to perhaps be more greatly informed of an externally determined process. Meaningful participation includes demonstrating an acknowledgement of the Michi Saagiig Nations as sovereign and engaging in dialogue around decision making within a framework or process that is mutually determined.

186. The CNSC and OPG have singular mandates with focused teams, budgets, and resources, including external consultants, to execute a specific scope of activities related to individual projects. Conversely, Michi Saagiig Nations have a broad mandate, large Territory, few staff, limited resources, and externally determined budgets to deal simultaneously with consultation requests from multiple governments, proponents and projects. When the consultation demands of the CNSC and its licensees outstrip the Michi Saagiig Nations' capacity, they are forced to decide on the priority of their attention. For example, as outlined above, there are multiple large-scale nuclear projects and related activities occurring in Michi Saagiig Nations Territory and the Michi Saagiig Nations cannot keep up with the volume of CNSC licence activities, let alone other regulatory and oversight processes. This reality forces the Michi Saagiig Nations to be minimally involved or compromise their values or governance processes to keep up with an externally determined timeline, for an externally determined process, instead of engaging in the meaningful consultation as set out by the Michi Saagiig Nations as well as by UNDA, FPIC, the DTCA and the Honour of the Crown. Such power imbalances only aid the continued hegemony of Canadian frameworks and unilateral decision-making which undermine Michi Saagiig Nations' sovereignty by overwhelming the Michi Saagiig Nations and limiting their ability to meaningfully participate.

187. Funding models create further obstacles as they are inconsistent and often with short notice. We received different amounts of CNSC funding for the DNGS PROL hearing than we did for the DNNP LTC hearing. We received notification of DNGS PROL hearing funding less than two months before submissions were due and after the Part 1 Hearing. Hiring external consultants to provide expertise is fraught with issues and puts the protection of our rights at risk. These are not our projects. The Crown is burdening us with infringements of our rights that we are forced to fight to protect. The funding should be sufficient and established within early timeframes.

188. The Michi Saaiig Nations assert their inherent rights, governance systems, and decision-making authority over their Lands, Waters, and resources. 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 include the Michi Saagiig Nations in decision-making processes, consistent with their sovereignty, protocols, internal governance and aligned with UNDRIP, the DTCA, and the Honour of the Crown. There remains a significant opportunity to evolve and to demonstrate meaningful two-way dialogue and co-governance. Meaningful integration requires genuine partnership and collaboration, where the Michi Saagiig Nations are involved from the earliest stages, ensured equal ability to fully and meaningfully participate, and opportunities to guide decisions in a way that reflects their values and responsibilities. It also requires that regulatory processes be adapted to accommodate the

Michi Saagiig Nations' ways of knowing, rather than expecting their knowledge to conform to colonial systems.

189. Despite the recognition and apology by the Crown in 2018 regarding the injustice of the Williams Treaties of 1923, and a reaffirmation of the Nation-to-Nation relationship, as well as the adoption by the federal government of UNDRIP in 2021, the Michi Saagiig Nations are expected to be subject to the unilateral authority of colonial regulations and decision-making processes and determinations by the CNSC and OPG such as the DNGS PROL Hearing. While the Michi Saagiig Nations appreciate and acknowledge the efforts of the CNSC and OPG to undertake consultation and engagement activities in more recent years, including making some incremental changes to the process, the fact remains that the CNSC and OPG are still expecting the Michi Saagiig Nations to engage through a process that is determined solely by the Crown, and without consideration of the Michi Saagiig Nations' ways of governance, responsibilities, values, decision-making or knowledge.

20-year not a 30-year licence

Michi Saagiig Nations Perspective - 20-Year vs. 30-Year Licence

190. The Michi Saagiig Nations submit that a 20-year licence term is the responsible decision over a 30-year term for several interconnected reasons. These reasons stem from our cultural values, historical experiences, environmental concerns, legal evolutions and the evolution of the Michi Saagiig Nations' relationship with OPG and the CNSC. A 20-year licence respects the Michi Saagiig Nations' intergenerational worldview, ensures more frequent accountability, builds trust through shorter commitments, mitigates environmental uncertainties, and matches the Michi Saagiig Nations' capacity for sustained engagement. It offers a pragmatic framework to protect rights and territory while allowing OPG to operate, fostering a partnership that can be revisited and refined within the span of a single generation.

Alignment with Intergenerational Responsibility

191. The Michi Saagiig Nations emphasize a stewardship model rooted in the Seven Generations principle. This philosophy calls for decisions to consider impacts on the next seven generations – roughly 140 to 200 years – while balancing present needs. A 20-year licence aligns more closely with this approach, offering a shorter, more manageable and single generation timeframe to:

    1. Assess the ongoing impacts of DNGS operations (e.g., tritium releases into Lake Ontario, waste accumulation) on lands, waters, and future generations.
    2. Revisit commitments and adapt mitigation measures based on observed environmental or cultural effects, rather than locking in a longer 30-year period that might outpace the Michi Saagiig Nations' ability to respond effectively.
    3. A 30-year term is an overreach, committing the Michi Saagiig Nations to nearly two generations of operational impacts without a formal mid-point reassessment, potentially eroding trust in the process.

Enhanced Accountability and Oversight

192. A shorter 20-year licence provides more frequent opportunities for the Michi Saagiig Nations to hold OPG and the CNSC accountable. Nuclear operations involve complex, long-term risks (e.g., reactor aging, waste storage expansion), and a 20-year term would allow:

    1. Regular Review: A re-licensing process at 20 years (i.e., 2045) forces a comprehensive evaluation of DNGS performance, safety upgrades, and engagement outcomes within a single generation, ensuring the licensee addresses First Nation concerns more promptly than at 30 years (i.e., 2055).
    2. Adaptation to Change: Over 30 years, technological, regulatory, or environmental shifts (e.g., climate change effects on Lake Ontario, changes in waste management processes and recycling opportunities) might outpace initial agreements. A 20-year term offers a natural checkpoint to renegotiate terms, incorporate new First Nation knowledge, or adjust operational plans based on real-time data.
    3. For example, the Michi Saagiig Nations might prioritize monitoring fish populations or water quality which could degrade subtly over decades. A 20-year horizon ensures these issues are revisited sooner, reducing the risk of cumulative harm and impacts being overlooked.

Historical Context and Trust-Building

193. The Michi Saagiig Nations' relationship with industrial projects, including nuclear facilities, is shaped by a history of insufficient consultation and unfulfilled promises, such as those tied to the Williams Treaties of 1923. A 30-year licence evokes concerns of being "locked in" to a long-term commitment with limited recourse, echoing past grievances. A 20-year term is more practical because it will:

    1. Build Trust Incrementally: Shorter intervals demonstrate OPG's good faith through consistent engagement and measurable outcomes, fostering a stronger partnership over time.
    2. Avoid Overcommitment: A 30-year term feels like an imposition and prioritizes OPG's operational convenience over the right to meaningful consent. A 20-year term respects the need for periodic consent and dialogue, aligning with [Reconciliaiton including…] the duty to consult under Section 35 of the Constitution Act, 1982 and UNDRIP/FPIC.

Environmental and Operational Uncertainty

194. The DNGS's operations involve refurbishments (extending reactor life to ~2055), waste management expansions and process changes, and potential new activities (e.g., isotope production, repackaging spent nuclear fuel in site), all of which carry environmental risks to Michi Saagiig Nations Territory, particularly Lake Ontario and its lakebed. A 20-year licence is more reasonable because it will:

    1. Limit Risk Exposure: Nuclear technology and waste storage evolve, and unforeseen issues (e.g., leaks, seismic risks) could emerge. A 20-year term reduces the duration of untested assumptions compared to 30 years, allowing the Michi Saagiig Nations to reassess risks sooner.

2. Match Refurbishment Cycles: The DNGS refurbishment, commenced in 2016, is phased across its four reactors, with completion projected around 2026-2028. A 20-year licence (e.g., 2025-2045) aligns with post-refurbishment performance reviews, giving the Nations a chance to evaluate long-term success or failures before a 30-year term extends operations into the 2050s.

    i. For instance, the Michi Saagiig Nations have concerns about tritium accumulation in fish – a staple of First Nation diets and culture – over decades. A 20-year term ensures monitoring data is reviewed and acted upon within a timeframe that feels actionable, not deferred beyond their current leadership's influence.

Practical Engagement Capacity

195. Continuous Indigenous engagement, as mandated in the proposed licence condition, requires significant resources from both OPG and the Michi Saagiig Nations. A 20-year term is more practical because:

    1. Resource Management: First Nation leadership, elders, and community members can sustain meaningful participation over 20 years without risking burnout or capacity strain, which a 30-year commitment might exacerbate.
    2. Funding Alignment: The CNSC's Participant Funding Program supports Indigenous involvement, but long-term funding commitments are uncertain. A 20-year term aligns with realistic budgeting cycles, ensuring the Nation can secure resources to engage effectively, rather than stretching thin over 30 years.

Michi Saagiig Nations Perspective in Context

196. The Michi Saagiig Nations participation in past CNSC processes, like the 2022 Pickering relicensing hearings or the Darlington New Nuclear Project Joint Review Panel, shows a consistent focus on protecting land, water, and rights. The Michi Saagiig Nations emphasized integrating traditional ecological knowledge into monitoring, a process better served by shorter, iterative licence terms that allow adjustments based on findings.

197. A 30-year term, while offering OPG operational stability, prioritizes economic efficiency over the Michi Saagiig Nations' ability to safeguard their treaty rights and territory. A 20-year term strikes a balance: it provides OPG with predictability while giving the Michi Saagiig Nations a stronger voice in managing long-term impacts, reflecting their role as stewards of the land.

Technical Arguments in Favour of a 20-Year License

Aging Infrastructure and Component Lifespan

198. Nuclear reactors, like the DNGS's CANDU units, rely on critical components (e.g., pressure tubes, steam generators) with finite lifespans. Refurbishments (e.g., DNGS's 2016-2028 program) extend life, but degradation rates accelerate as systems age beyond 40-50 years of total operation. A 20-year term (to 2045) aligns with post-refurbishment performance data collection, allowing reassessment of wear (e.g., embrittlement, corrosion) before committing to 30 years (to 2055).

1. Example: Pressure tubes in CANDU reactors are replaced during refurbishment, but their long-term behavior under neutron flux is uncertain beyond 25-30 years post-replacement. A 20-year licence ensures safety margins are re-evaluated sooner.

Technological Obsolescence

199. Nuclear technology evolves rapidly (e.g., advanced monitoring systems, small modular reactors). A 20-year term allows integration of new safety or efficiency upgrades by 2045, avoiding the risk of locking in outdated systems for an additional decade. Over 30 years, innovations might outpace the plant's design, complicating retrofits mid-licence.

Waste Management Uncertainty

200. Facilities like the Darlington Waste Management Facility store spent fuel on-site, with plans for additional dry storage buildings. A 20-year term matches realistic planning horizons for waste volume forecasts and interim storage capacity, reducing the risk of underestimating needs over 30 years, especially if Canada's deep geological repository plans remain delayed.

Regulatory Considerations in Favour of a 20-Year License

Enhanced Safety Oversight

201. The CNSC emphasizes adaptive regulation. A 20-year term provides a mid-point check (e.g., 2045) to reassess safety standards against evolving international benchmarks (e.g., IAEA guidelines), ensuring compliance with emerging risks like climate-induced flooding or cybersecurity threats.

    1. Example: The CNSC's REGDOC-2.4.1 (Deterministic Safety Analysis) evolves over time; a 20-year term aligns relicensing with regulatory updates.

Michi Saagiig Nations and Community Engagement

202. The Michi Saagiig Nations and local communities benefit from more frequent opportunities to influence operations. A 20-year term ensures their concerns (e.g., tritium releases, emergency planning) are addressed within a generation, aligning with Canada's duty to consult under Section 35 and the CNSC's Indigenous Knowledge Policy Framework.

Flexibility for Policy Shifts

203. Nuclear policy may shift over decades (e.g., carbon pricing, renewable integration). A 20-year term allows regulators to adjust license conditions sooner, balancing the role of nuclear in Ontario's energy mix without overcommitting to 30 years of static assumptions.

Other Practical Arguments in Favour of a 20-Year License

Community and Workforce Planning

204. A 20-year term provides a clear horizon for local stakeholders (e.g., Clarington residents, Indigenous groups) to plan economic reliance on DNGS jobs and services. It avoids over-optimism of a 30-year commitment, which might delay diversification if decommissioning looms earlier.

1. Example: A 2045 review allows the Michi Saagiig Nations to reassess economic benefits (e.g., jobs, funding) versus environmental trade-offs.

Resource Allocation

205. OPG can focus resources on operational excellence and engagement over 20 years without the financial uncertainty of a premature relicensing process. A 30-year term risks stretching budgets thin if unexpected repairs or regulatory changes arise late in the term.

Public Perception

206. Shorter terms signal responsiveness to public concerns about nuclear safety and environmental impact, boosting trust. A 20-year license avoids perceptions of "rubber-stamping" a 30-year term, especially amid growing scrutiny of nuclear waste and climate resilience.

207. A 20-year license is more reasonable when prioritizing adaptability to aging infrastructure, frequent regulatory checks, and stakeholder (e.g., Indigenous) concerns. It offers a cautious, flexible approach, ensuring safety and trust without overcommitting to untested long-term risks. For the DNGS, a 20-year term (to 2045) better balances technical uncertainty (e.g., post-refurbishment performance) and practical engagement with the Michi Saagiig Nations. The choice hinges on weighting safety and trust for the Michi Saagiig Nations versus efficiency and continuity for OPG.

Part 4 – The Findings and Relief – The Michi Saagiig Nations' Asks

208. For the reasons provided herein, the Michi Saagiig Nations are asking the Commission to find:

a. This application triggers an obligation to legitimately examine the nature of the Crown's decision and the potential impacts such decision may have on Indigenous rightsholders, Indigenous rights, treaties, title, agreements and territories;

b. The presumption that relicensing applications do not require consultation is rebuttable and may require the Crown to discharge the DTCA;

c. That the DTCA was triggered and that there was a lack of meaningful consultation and accommodation;

d. That even if the DTCA was not triggered, the Honour of the Crown and the law of Canada requires the application of UNDRIP Articles and principles, including FPIC and economic reconciliation, and that the Crown has not fulfilled this obligation, yet;

e. That the way in which the Crown may act honorably is through the imposition of conditions on OPG and commitments of the CNSC.

209. **As such, the Michi Saagiig Nations are asking the Commission to issue the following orders**:

That in the event the Commission grants an extension of the licence to OPG that:

a. The licence term is for a maximum period of 20 years;

b. The licence is conditioned, as discussed herein, to provide a framework for ongoing consultation and the furtherance of Reconciliation between the Crown and the Indigenous communities;

c. That to address the inadequacies of the CNSC's current process in respect of Indigenous rightsholders and to allow for meaningfully participation by the Indigenous rightsholders in the CNSC process, to ensure there is an ability to fulfill the DTCA, make the following commitments:

i. A government-to-government relationship which incorporates the Michi Saagiig Nations into the regulatory process, as discussed below.

ii. To ensuring meaningful consultation and accommodation including economic reconciliation with the Michi Saagiig Nations.

iii. To a holistic approach to OPG nuclear activities as they impact the Michi Saagiig Nations, instead of the application-by-application basis.

210. The Michi Saagiig Nations represent constitutionally protected governments responsible for the well being of our citizens, Mother Earth, the natural and spiritual world. We have intimate knowledge of the lands and water and with a reciprocal relationship to ensure they are protected. Unlike western conservation efforts, our job is to ensure we leave the environment better off than how we inherited it. We view our obligations over seven generations and our perspective is based upon ensuring we fulfill our obligations.

211. Currently, we are treated as third-party intervenors subject to the good graces of the CNSC staff and OPG to decide which aspects of the DNGS activities we are informed of. This is a continuation of the demeaning paternalistic Crown-Indigenous relationship that the Crown has turned away from, at least on paper.

212. The licence condition aligns the Michi Saagiig Nations status, and values and supports Canada's commitment to reconciliation, UNDRIP and FPIC, and the CNSC's Indigenous Knowledge Policy Framework, which emphasizes integrating Indigenous perspectives into regulatory processes. The DNGS's location on treaty and traditional territories and its environmental footprint (e.g., thermal discharges into Lake Ontario) necessitate ongoing dialogue to respect Aboriginal rights and address potential impacts. Past CNSC and OPG engagement efforts and binding agreements provide a foundation, but this condition formalizes and extends those efforts specifically for DNGS operations.

213. The 20-year timeframe reflects a balance between operational certainty and the need for periodic reassessment, shorter than OPG's requested 30-year term but longer than the current 10-year licence. Continuous engagement ensures that First Nation voices remain part of decision-making as the facility ages, undergoes further refurbishments, or adapts to new technologies (e.g., cobalt-60 or molybdenum-99 production).

The License Condition Text

214. "The licensee shall conduct Indigenous engagement activities specific to the Darlington Nuclear Generating Station (DNGS) throughout the 20-year license period. These activities shall focus on operational engagement and consultation with Williams Treaties First Nations and other affected Indigenous groups, as

identified in consultation with the CNSC and/or through binding agreements between OPG and specific First Nations. The licensee shall:

- Hold at least semi-annual meetings to share operational updates, safety data, and environmental monitoring results;
- Collaborate on rights impact assessments and mitigation measures related to DNGS operations and use of Lake Ontario and its lakebed, including waste management and assessments of industry waste management reduction and recycling research and development, and emergency planning;
- Integrate Indigenous knowledge into environmental monitoring programs where shared with the licensee;
- Submit an annual public report to the CNSC documenting engagement activities and outcomes, with input from Indigenous participants; and Provide opportunities for site visits and capacity-building workshops. The licensee shall adapt these activities based on Indigenous feedback and operational changes, subject to CNSC oversight."

CNSC Process Evolution

215. The CNSC has the authority under the *NSCA* to establish an IAC, mirroring successful models like the Canada Energy Regulator's Indigenous Advisory and Monitoring Committees. We urge the CNSC to act on this authority to ensure the Michi Saagiig Nations are integral to decision-making, not treated as third-party intervenors.

216. The current CNSC process is not conducive to fulfillment of a DTCA. In short, it provides insufficient notice and time, fails to ensure adequate funding is available in a timely manner, is overly rigid in that it does not consider the breadth of the Indigenous interests nor the manner in which the Indigenous community seeks to undertake engagement.

217. The Michi Saagiig Nations would reiterate a request for the formation of an IAC for all CNSC projects which involve the Michi Saagiig Nations as an ideal vehicle for ensuring the Nations are properly treated as government bodies.[120] The IAC will create a holistic process throughout the life cycles of the DNGS, DNNP and PNGS. Feedback will be fluid and continuous instead of piece meal at certain regulatory intervals as outlined in the CNSC staff submission.[121]

[120] Indigenous peoples, the Government of Canada, and the CER worked together to create the Indigenous Advisory and Monitoring Committees ("**IAMCs**"). IAMCs operate independently to increase Indigenous involvement in the federal monitoring and oversight of projects. The Committees allows for Indigenous peoples to participate meaningfully in oversight activities along pipeline corridors while companies do work to build and operate the projects. Indigenous monitors participate with the CER in inspections; emergency response exercises; and compliance verification meetings.

[121] Canadian Nuclear Safety Commission Staff submission CMD 25-H2.A, 25-H2.B for A Licence Renewal in the Matter of Ontario Power Generation Inc and the Darlington Nuclear Generating Station Commission Public Hearing – Part 1, 21 February 2025 at page 88.

UNDRIP Policy Implementation Group

218. The Michi Saagiig Nations requested the creation of an IAC during the DNNP LTC application. Unfortunately, the Commission instead order a working group.[122] A working group misses the point of an IAC, which is to integrate the Michi Saagiig Nations into all stages of the process by providing an avenue for having a voice and being a part of decision-making. This will ensure the Michi Saagiig Nations are privy to information and decisions which affect them (as opposed to the CNSC or OPG deciding which information to share), provides a constructive environment for providing Indigenous perspectives which will result in a reciprocal relationship for sharing knowledge and learning from each other and will ultimately lead to better processes and outcomes. An IAC is one constructive way to uphold reconciliation, the treaty relationship, and the Honour of the Crown.

219. Currently, the Michi Saagiig Nations must wait to become aware of applications, then attempt to ascertain the impact of the application upon their community. These proceedings are quasi-judicial and require the dedication of significant resources to have even the opportunity of reviewing and comprehending the evidence, the retention of counsel and potentially experts. Having just a few months to put forth applications for funding, seek assistance and participate in the hearing process does not permit Indigenous communities the time and resources to meaningfully contribute. The CNSC should be providing as much information as possible to the Michi Saagiig Nations regarding any upcoming applications or proceedings pertaining to their traditional territories.

220. The Michi Saagiig Nations should be a party to CNSC proceedings rather than regarded as third-party intervenors. This includes a standing right to participate in Part 1 of two-part hearings. The CNSC staff, including the Registrar, is supportive of this and have committed to working with the Michi Saagiig Nations.[123]

221. The Michi Saagiig Nations would suggest a separate process to update the CNSC policies and procedures with the input of multiple Indigenous communities that have or are likely to have an interest in future proceedings. This will allow the "rules of the game" to be more appropriately established to achieve the objective of understanding the nature of the DTCA and discharging such duties.

222. We would suggest that the CNSC establish a permanent funding mechanism for Indigenous participation that will ensure the costs of responsible participation will be recoverable. Michi Saagiig Nations have worked to reduce costs through the retention of a single representative. In this way, Michi Saagiig Nations would have comfort that their reasonable costs of participation will be recovered and would be able to procure assistance on such basis.

Concluding Thoughts

223. We are heartened by OPG's public commitment to meaningful engagement, including their promise to develop a framework for ongoing collaboration with the Michi Saagiig Nations post-licensing (OPG Submission, page viii). However, the CNSC's determination that the DTCA is not triggered for the DNGS renewal has limited opportunities for formal

[122] *Supra* note 47 at para 432.
[123] *Supra* note 121 at page 90.

consultation, sidelining our role as sovereign treaty partners. Even absent a DTCA trigger, the CNSC has a legal obligation to uphold UNDRIP, FPIC, and economic reconciliation. We urge the CNSC to honor these commitments by integrating the Michi Saagiig Nations into the regulatory process for this and future facility license renewals, building on OPG's foundation of dialogue to advance reconciliation.

224. Fulfillment of UNDRIP and ensuring FPIC is obtained are not "niceties", are not aspirational objectives, but rather legally binding obligations on the Crown. UNDRIP is not simply an interpretative tool for the DTCA. They may be woven together, but they are separate considerations. UNDA applies regardless of whether the DTCA is triggered.

225. We request the Commission uphold the reconciliation relationship with the Michi Saagiig Nations; uphold the promises and commitments of the Crown, its Ministries and wholly owned corporations.

226. Honour is fulfilling your commitments and public statements. Honour is not using technicalities to evade consultation with the Michi Saagiig Nations. Honour is not seeking to do the minimum, but what is right.

227. The Michi Saagiig Nations are asking the Commission to hold the Crown to its treaty promises and to live up to the principles of Reconciliation and update its process to meet the legal requirements of today.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Schedule "A"

Draft DNNP Site SP
ECIFIC LCH CONDITION FOR INDIGENOUS ENGAGEMENT

Licence Condition:

The licensee shall conduct Indigenous engagement activities, specific to the DNNP, throughout the period of this licence.

Preamble:

As per Section 8(2) of the *Nuclear Safety and Control Act*, the Commission is an agent of the Crown. As such, the Commission has the obligation to fulfil the Duty to Consult and, where appropriate, accommodate, Indigenous peoples when the Crown contemplates conduct that might adversely impact potential or established Indigenous and/or treaty rights. In meeting its obligations towards Indigenous Nations and communities, the Commission may rely on Consultation undertaken by CNSC staff as well as the opportunities for Indigenous Nations and communities to make submissions directly to the Commission and to participate in the hearing process. To assist the Commission in meeting its duty to consult and, where appropriate, accommodate, the Commission may also rely on the engagement work of licensees. This includes consideration of measures to avoid or mitigate potential adverse impacts or other measures adopted or proposed by licensees for potential accommodation purposes.

A public information and disclosure program is required by the *Class I Nuclear Facilities Regulations*, which requires that licensees describe and maintain a program to inform persons living in the area of the site of the nature and characteristics of the anticipated effects of the activity on the environment, as well as on the health and safety of people. REGDOC-3.2.1 - *Public Information and Disclosure* also specifies that Indigenous Nations and communities should be included as a target audience for the licensee's public information and disclosure program.

As per section 6 of REGDOC-3.2.2 – *Indigenous Engagement*, licensees may be required to continue to engage Indigenous Nations and Communities after an Environmental Assessment or licensing decision. Licensees may also be required to update the CNSC about their ongoing Indigenous engagement activities—for example, the status of the implementation and effectiveness of mitigation and accommodation measures.

The Michi Saagiig of the WTFNs views this licence condition: “The licensee shall conduct Indigenous engagement activities, specific to the DNNP, throughout the period of this licence.” – to also encompass the concepts below which can serve as examples of future licence conditions which could be proposed to the Commission for potential future licence applications and subsequent consideration and decision by the Commission.

- The licensee shall, provide mitigations, commitments and/ or accommodations as developed during Indigenous engagement activities, specific to the DNNP, throughout the period of this licence.

- The licensee shall fulfill consultation and/or engagement requirements related to Federal and Provincial authorizations and provide updates to the CNSC on the status of these activities.

Items for further discussion between the Michi Saagiig Nations and CNSC

Through the interventions submitted by the Michi Saagiig Nations (CMD 24-H3.62, CMD 24-H-3.81, CMD 24-H-3.83 and CMD 24-H3.85), the Michi Saagiig Nations have identified the need for further discussions with the CNSC on policy, programs and processes that would encourage meaningful consultation, improved decision-making and a process that seeks to obtain their consent. The CNSC is committed to continuing these discussions. This request is being included here for completeness and is not a requirement on OPG.

Compliance Verification Criteria:

OPG shall conduct ongoing engagement specific to the DNNP with the identified Indigenous Nations and communities with Indigenous and/or Treaty rights in the area of the DNNP and those who have expressed interest in the DNNP, throughout the licence period. If an Indigenous Nation and/or community is non-responsive, OPG shall continue to share information and provide opportunities for engagement, unless the Indigenous Nation and/or community specifically declines the engagement opportunities and requests that OPG stop sharing information regarding the DNNP.

The DNNP is located within the Williams Treaties territory. OPG shall continue to collaborate and engage with the Michi Saagiig Nations of the Williams Treaties First Nations on the specific commitments and accommodations made throughout the regulatory review process. This includes, but is not limited to:

1. Scoping the extent, timing and content and supporting the development and implementation of a regional Indigenous Knowledge Study
2. Scoping the extent, timing and content and supporting the development and implementation of a Cumulative Effects assessment
3. Scoping the extent, timing and content and supporting the development and implementation of an Environmental Monitoring Augmentation Program and participation by the Michi Saagiig Nations in OPG's existing and planned environmental monitoring program.
4. Periodic review of international best practices for the management and storage of used nuclear fuel, in relation to the current practices.

OPG, in collaboration with the Michi Saagiig Nations, shall incorporate the outcomes of these studies, where appropriate, into the OPG's Environmental Monitoring and Environmental Assessment Follow-Up Plan (EA FUP). OPG shall include an update on any progress made on these specific commitments in its annual Indigenous Engagement Report (as described below). The report shall include any relevant information and context regarding the current status of, timelines, and progress made on the agreed upon studies and commitments.

CNSC staff will oversee compliance against commitments listed as 1 through 4 above.

Additional Commitments between the Michi Saagiig Nations and OPG

Additionally, the CNSC acknowledges that OPG and the Michi Saagiig Nations have collaboratively developed and agreed to the following commitments which are being included here for completeness while respecting that these are outside the CNSC's mandate and authorities for compliance and oversight.

A. Scoping the extent, timing and content for the comprehensive gap analysis for the DNNP (EAA vs IAA); thereby informing the scope, timing and content of the EA FUP.
B. Scoping the extent, timing and content of the plan/program for onsite and offsite offsetting and restoration (aquatic and terrestrial) to offset impacts by the projects and to protect and enhance lands and waters important to MSIFN, HFN, CLFN, AFN. This plan/program would also include beneficial action areas (including an instrument to protect such areas). This plan/program would be supported by the potential establishment of a long-term Ecological Restoration Fund.
C. Scoping the extent, timing and path forward in regard to provincial authorizations related to the potential issuance of a land use easement for the Lake Ontario lake bed
D. Scoping the extent, timing and path forward in regard to mutually binding agreements that includes but are not limited to the preceding list above.

The CNSC does not have the mandate and authority to provide compliance and oversight of commitments listed as A through D above and these do not form part of the CVC.

Requirements for the annual Indigenous Engagement Report

OPG shall file with the CNSC annually a report on the engagement activities specific to the DNNP it has undertaken with potentially impacted or interested Indigenous Nations and communities. The deadline for submission of this report shall be the first of May of each calendar year. OPG should also provide a copy of the report to each Indigenous Nation or community engaged in advance or at the same time it is filed with the CNSC. It is acknowledged that an Indigenous Nation or community may share information with OPG in confidence. OPG is not required to put confidential information in its annual reporting to the CNSC. OPG should work with the Indigenous Nation or community to ensure this information is not disclosed and the Indigenous Nation or community is comfortable with the level of detail communicated within the report.

Each report shall include, at a minimum, and for each Indigenous Nation and community engaged:

- The name of the Indigenous Nation or community.
- The method(s), date(s), location(s), and topics of engagement activities with the Indigenous Nation or community.
- A summary of any issues, interests, or concerns raised, including those in relation to any potential impacts on identified or established Indigenous and/or Treaty rights.
- The measures taken, or that will be taken, to address or respond to the issues or concerns. Alternatively, an explanation as to why no further action is required to address or respond to issues or concerns shall be provided.

- A description of any changes to project activities and/or programs to address and incorporate the measures taken to respond to issues or concerns, or to incorporate knowledge and feedback from Indigenous Nations and communities.
- The status of the implementation of the studies and commitments (see items 1 through 4 above) to address concerns raised with respect to the LTC application.
- An update on engagement conducted related to the progress on regulatory hold points
- An update (in an appendix) related to the status of OPG commitments listed as A through D

Licensing Basis Publications

Document Number	Document Title	Version	Effective Date
REGDOC-3.2.2	Indigenous Engagement	V1.2	31 December 2022

Licensee Documents that Require Notification of Change

Document Title	Document #	Prior Notification
None		

Recommendations and Guidance:

In conducting its engagement activities, OPG should consider the guidance provided throughout REGDOC-3.2.2 - *Indigenous Engagement*.