



## **Supplementary Information**

### **Oral presentation**

### **Written submission from the Kebaowek First Nation**

In the Matter of the

### **Canadian Nuclear Laboratories (CNL)**

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Application from the CNL to amend its  
Chalk River Laboratories site licence to  
authorize the construction of a near surface  
disposal facility

### **Commission Public Hearing Part 2**

**May 30 to June 3, 2022**

## **Renseignements supplémentaires**

### **Exposé oral**

### **Mémoire de la Première nation de Kebaowek**

À l'égard des

### **Laboratoires Nucléaires Canadiens (LNC)**

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Demande des LNC visant à modifier le permis  
du site des Laboratoires de Chalk River pour  
autoriser la construction d'une installation de  
gestion des déchets près de la surface

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

**30 mai au 3 juin 2022**



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## **Kebaowek First Nation Submission to the Canadian Nuclear Safety Commission**

### **Re: Canadian Nuclear Safety Commission's Hearing (Part 2) on the Canadian Nuclear Laboratories' Proposed Near Surface Disposal Facility**

#### Introduction

These submissions are provided by the Algonquin First Nation of Kebaowek (KFN) who wish to intervene in response to the Canadian Nuclear Safety Commission's (CNSC) Revised Notice of Public Hearing on Canadian Nuclear Laboratories' (CNL) application to amend its nuclear research and test establishment operating license for the Chalk River Laboratories' (CRL) site to authorize the construction of a "Near Surface Disposal Facility" (NSDF) for low-level radioactive waste.<sup>1</sup> These submissions are intended for part 2 of the hearing and regarding CNSC's determinations on whether the NSDF project will likely cause significant adverse environmental effects pursuant to the *Canadian Environmental Assessment Act, 2012* (CEAA) (project registry number: 1547525) and whether the license amendment should be granted under the *Nuclear Safety and Control Act* (NSCA).<sup>23</sup> KFN intends to expand on these written submissions in its oral submission at part 2 of the hearing.

The proposed CNL NSDF project is located within KFN's traditional territory and adjacent to KFN's title territory, and accordingly has the potential to significantly affect it and KFN's rights attached to it. KFN has been identified by the CNSC as an Indigenous Nation whose traditional territories cover the site the NSDF project is being proposed on.<sup>4</sup> KFN entered into a participant funding agreement ("the funding agreement") with the CNSC to provide this intervention. Notably, KFN's application for the funding agreement was only accepted on March 18, 2022. The agreement was then executed on April 4, 2022.

KFN takes the position that the CNSC has not engaged in consultation via a good faith process intended to obtain the free, prior and informed consent of our community with respect to the Environmental Assessment (EA) of the NSDF. We further take the position that the duty to consult and accommodate has been eliminated and/or seriously reduced. For example, on July 2, 2021, CNSC staff completed their review of CNL's submission of the final Environmental Impact Statement (EIS) as a result of its EA for the NSDF and determined that the information provided

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<sup>1</sup> Canadian Nuclear Safety Commission, "Revised Notice of Public Hearing including Procedural Guidance for Intervenors" February 16, 2022.

<sup>2</sup> *Canadian Environmental Assessment Act, 2012*, SC 2021, c 19.

<sup>3</sup> *Nuclear Safety and Control Act*, SC 1997, c 9.

<sup>4</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 125.

is complete and that the final EIS is acceptable.<sup>5</sup> CNSC staff proceeded to prepare and publish its Environmental Assessment Report (EAR) which concluded with the recommendation that, “Taking into account the implementation of the proposed mitigation measures, follow-up monitoring program measures and commitments made by the CNL to Indigenous Nations and communities, CNSC staff recommend that the Commission conclude that the NSDF Project is not likely to cause significant adverse environmental effects” referred to in subsections 5(1) and 5(2) of the CEEA.<sup>6</sup>

Considering its conclusions in the EAR, and a technical review of CNL’s licensing application, CNSC staff further recommend in their Commission Member Document (CMD) that the Commission approve CNL’s licensing application as it meets the criteria under paragraphs 24(4)(a) and (b) of the NSCA and that the CNSC has upheld the honour of the Crown in fulfilling its duty to consult and accommodate (DTCA).<sup>7</sup>

KFN takes the position that the CNSC has not fulfilled its DTCA as KFN has not been meaningfully engaged in any of the processes leading up to this hearing and therefore has not been able to properly express its concerns and have them responded to or addressed by CNSC or CNL. Without knowing the potential impacts the proposed project may have on KFN rights and interests and without having fulfilled its constitutional obligations to consult with and accommodate KFN, the CNSC cannot make a final decision on this application.

KFN urges the Commission to:

- Deny CNL’s application to amend its license; or
- In the alternative, defer the decision on CNL’s application for not less than 12 months, to allow for the proper fulfillment of the Duty to Consult and Accommodate.

#### United Nations Declaration of the Rights of Indigenous Peoples

Although the mandate of the CNSC does not mention a mandate to examine the relationship between the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the NSDF, the Committee should be reminded of your government’s adoption of UNDRIP at the UN assembly and incorporate the “minimal standards” developed by States and Indigenous peoples from around the world with respect to the protection of waters used and valued by Indigenous people.<sup>8</sup>

Article 32 of UNDRIP recognizes the right of Indigenous Peoples’ to control development of their traditional territories and resources. Among that development is the exploitation and use of water resources. In fact, States such as Canada should be engaged in good faith processes with Indigenous

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<sup>5</sup> Government of Canada Impact Assessment Agency of Canada, Canadian Impact Assessment Registry, “Near Surface Disposal Facility Project”, modified as of February 24, 2022 <<https://iaac-aeic.gc.ca/050/evaluations/proj/80122>>.

<sup>6</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p iv.

<sup>7</sup> Canadian Nuclear Safety Commission, Commission Member Document for “A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site”, January 24, 2022 at p ii-iii.

<sup>8</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

peoples affected by development projects in their territories in order to obtain the free, prior and informed consent prior to the approval of any project affecting Indigenous water resources.

Article 32 states (emphasis added):

1. “Indigenous Peoples’ have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”<sup>9</sup>

Article 25 of UNDRIP recognizes the distinctive relationship that Indigenous peoples can have with the resources they are entrusted to maintain for future generations (emphasis added):

Indigenous Peoples’ have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally-owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.<sup>10</sup>

Article 26 of UNDRIP recognizes:

1. “Indigenous Peoples’ have the rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous Peoples’ have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs traditions and land tenure systems of the Indigenous Peoples’ concerned.”<sup>11</sup>

Further, Article 11 recognizes our right to culture:

1. “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future

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<sup>9</sup> UN General Assembly, *United Nations Declarations on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Art 32.

<sup>10</sup> UN General Assembly, *United Nations Declarations on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 Art 25.

<sup>11</sup> UN General Assembly, *United Nations Declarations on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 Art 26.

manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”<sup>12</sup>

Article 12 recognizes our right to our spiritual practices:

1. “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”<sup>13</sup>

In the evolving context of Canada adopting the above UNDRIP articles, we would like a response from the Commission as to what extent will the NSDF engage gender based analysis and support the past, present, and future relationship of Algonquin women as “waterkeepers” in the watershed. To what extent does the Commission recognize the relationship of sacred sites on waterways such as Ouiseau Rock across from Chalk River in this assessment? When considering the authorization of the NSDF project, how will the distinctive Indigenous relationship or the principle of sustainability inherent in the international Indigenous environmental ethic of “responsibilities to future generations” be respected?

### KFN’s Relationship to the Affected Territory

The Algonquin Nation is made up of eleven distinct communities recognized as Indian Act bands. Nine are based in Quebec and two are in Ontario. The Algonquin Anishinabe Nation Tribal Council is comprised of six Algonquin first nations: Kebaowek, Long Point, Kitigan Zibi, Lack Simon, Abitibiwinni and Kitcisakik. The Algonquin Nation has never given up inherent title or jurisdiction to our traditional lands. This includes all the lands and waterways within the Ottawa River watershed on both sides of the Ontario-Quebec border.

Inherently, our lands and waters are part of the Anishinaabe Aki, a vast territory surrounding the Great Lakes in North America. For centuries we have relied on our lands and waterways for our ability to exercise our inherent rights under our own system of customary law and governance known to us as Ona’ken’age’win. This law is based on mobility around the landscape, the freedom to hunt, gather and control the sustainable use of our lands and waterways for future generations.

Algonquin social, political and economic organization was based on watersheds, which served as transportation corridors and family land management units around the Ottawa River Basin. Algonquin Peoples’ occupy the entire length of the Kichi Sipi or Ottawa river (which literally

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<sup>12</sup> UN General Assembly, *United Nations Declarations on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 Art 11.

<sup>13</sup> UN General Assembly, *United Nations Declarations on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 Art 12.

translates as “big river”) from its headwaters in north central Quebec to the sacred sites at Bird Rock, across from Chalk River Nuclear Facility, and Akikodjiwan, Chaudière Falls in Ottawa and all the way out to its outlet in Montreal.

Our ancestors never contemplated our lands and waterways to be obstructed or industrial. Nor has government legislation ever adequately protected our lands and waterways. When the Government of Canada initiated the installation of nuclear facilities at Chalk River, no assessments were undertaken to determine how these nuclear installations might affect Algonquin peoples.

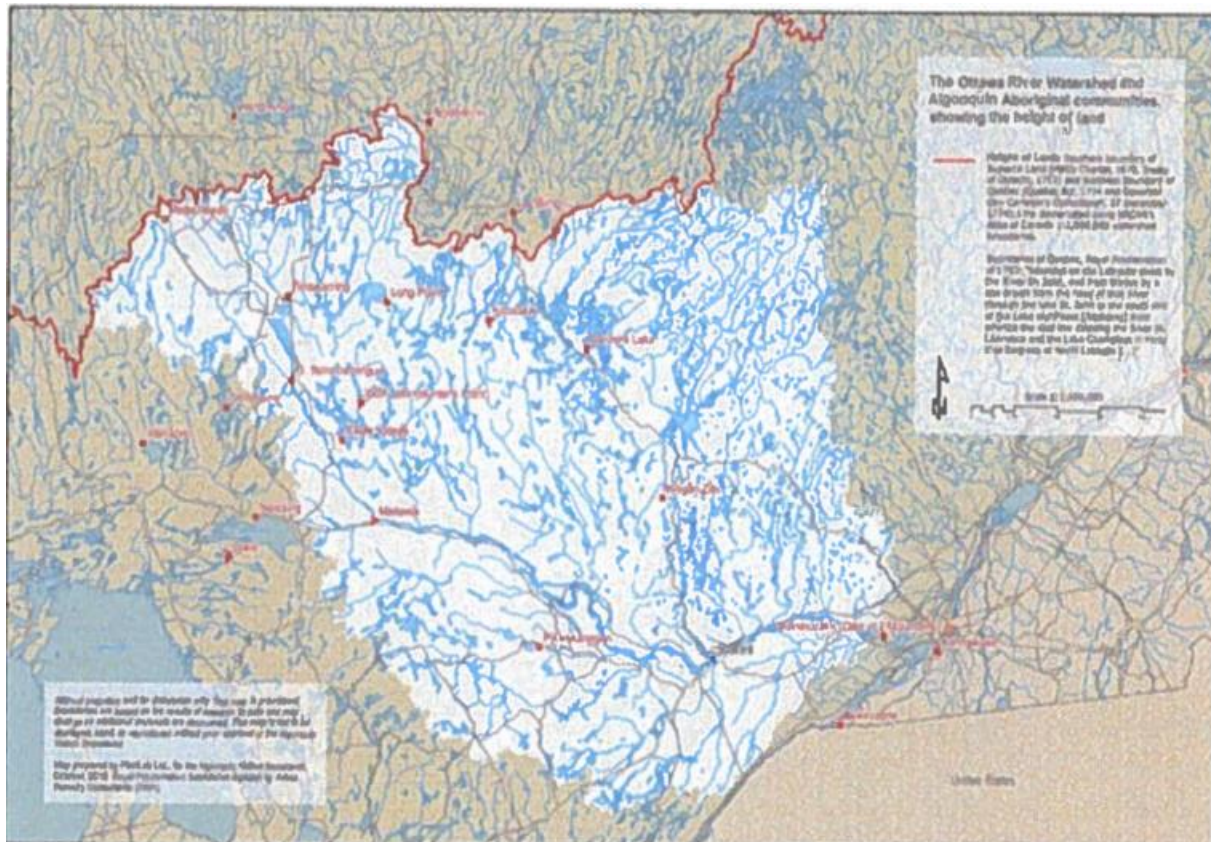


Figure 1: The Ottawa watershed and Algonquin Communities

Aboriginal title is held at the community level within the Algonquin Nation where we assert unceded Aboriginal rights including title under section 35 of the Canadian Constitution.<sup>14</sup>

Kebaowek First Nation is made up of 999 members. KFN asserts Aboriginal rights and title over our traditional lands which are located in present-day Ontario and Quebec. KFN’s reserve lands are on Lake Kipawa in Quebec. The reserve and band office is located fifteen kilometers from the Ontario-Quebec border. KFN has a satellite office in Mattawa, Ontario, proximate to the proposed NSDF at the Chalk River Nuclear site.

Four hundred and twenty-eight members live off reserve in Ontario. The Nation’s mandate is to support community members to continue to occupy, manage, safeguard and intensively use Algonquin territory lands and waterways as they carry out traditional and contemporary activities.

<sup>14</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, ss 35.

All such initiatives are based on a community model of self-determination and a history of Algonquin culture, language, traditional knowledge, eco-logical sustainability and land governance.

On January 23, 2013, Kebaowek First nation, Wolf Lake First Nation (WLFN) and Timiskaming First Nation (TFN) jointly released a Statement of Asserted Rights and Title (SART) which summarizes the Aboriginal rights, including title, which our three First nations assert and provides detailed evidence to substantiate it including around the Chalk River nuclear site. Copies of the SART, maps and background documentation were transmitted to the governments of Canada, Quebec and Ontario in January 2013. In Summary, our First nations have not relinquished Aboriginal rights and title, over lands that straddle the Ottawa River basin on both sides of the Quebec-Ontario boundary. The importance of this information in establishing consultation processes and the responsibilities of the Crown are affirmed by existing case law.<sup>15</sup>

As was raised by KFN before the CNSC on November 7, 2019 Algonquin Peoples' are not to be referred to as an Indigenous "group". Algonquin Peoples' do not consider themselves a group, but a Nation with rights both inherent and protected under the Canadian Constitution Section 35.<sup>16</sup> Further, KFN is recognized as a "Band" under the *Indian Act*, and its community members come under the definition of "Indian peoples" under section 35 of the *Constitution Act, 1982*.<sup>17</sup><sup>18</sup> While KFN is a part of the Algonquin Nation and recognizes its traditional territory and corresponding rights communally with it, KFN is an individual First Nation with its own history, culture and traditions. Accordingly, in the context of consultation, KFN must be consulted with as an independent nation and with the recognition of its specific rights.

#### KFN's Rights Flowing from Title

As mentioned, there is no treaty covering the Algonquin Nation's traditional territory. KFN's title territory lies within this traditional territory, northwest and upstream of the CNL site and consequently we have active Aboriginal title with respect to our lands. KFN's Aboriginal title stems from its historic occupation of its territory specifically. Its title has remained intact and survived the assertion of British sovereignty and has never been ceded or surrendered by treaty.

KFN's title claim is about our ownership, not only of the land portion of its territory, but includes the airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams.

First Nations enjoy a number of important rights as a result of our Aboriginal title. The Supreme Court of Canada has clarified that with Aboriginal title comes the right to:

1. benefit from the land, including to profit from it economically;
2. decide how the land will be used;

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<sup>15</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#).

<sup>16</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 179.

<sup>17</sup> *Indian Act*, R.S.C., 1985, c. I-5, ss 2(1).

<sup>18</sup> *The Constitution Acts, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, ss 35.

3. enjoy and occupy the land;
4. possess the land; and
5. pro-actively use and manage the land.<sup>19</sup>

These rights that flow from title have an important impact on the Crown's duty to consult and accommodate. They become the rights and interests for which consultation is owed, meaning that a project's potential impacts on any of the above-listed rights that flow from title must be mitigated and accommodated. This is in addition to the consultation that is owed to the KFN on our constitutionally protected Aboriginal rights to engage in activities such as fishing, hunting, trapping, and gathering.

While the site in question is not within KFN's title territory, the impacts of the proposed project will undoubtedly be felt upstream from it. Consequently, our rights that flow with our title to our land are engaged in this process.

#### History of KFN's Dealings with the CNSC and its "Consultation" Processes

KFN has communicated to the CNSC from the initiation of this project that a jointly established Consultation Framework Agreement (CFA) is the only way forward for us to meaningfully engage in consultation on this project and for the CNSC to fulfill the DTCA. KFN has dealt with the CNSC in its prior "consultation" attempts with respect to other projects on the CRL site where the DTCA was not honoured through CNSC's existing approach to consultation.<sup>20</sup> As explained in our presentation at the CNSC's public meeting on November 7, 2019, on the Regulatory Oversight Report on CNL Sites, the CNSC's current consultation approach does not honour a meaningful nation-to-nation relationship and allow for the two-way dialogue required by the DTCA.<sup>21</sup> It has always been our hope that creating an agreed-upon framework for these consultations moving forward will allow for the necessary changes in this process in order to facilitate this interaction and the fulfillment of the CNSC's DTCA. Specifically, we have expressed concern with our ability to engage our community members considering the formal nature of these processes and hearings as they currently stand.<sup>22</sup> However, there are historical examples of successful engagement, for example, the 1977 Berger Inquiry, wherein First Nations in consideration of the McKenzie Valley Pipeline proposal were able to adequately present their own evidence as heard by Commissioner Berger in their own communities. Accordingly, we have expressed our desire for hearings to occur on the territory itself where our community members will feel comfortable and empowered to express their concerns.<sup>23</sup> KFN has also taken issue with the hearings on these matters only allocating ten minutes for us to interact with the Commission as this time is inadequate – it doesn't give us a real opportunity to discuss our concerns.<sup>24</sup> The current hearing framework also excludes cross-examination which is necessary to determine the weight that should be given to evidence. We have also expressed our concerns with how the CNSC relies on the concept of "Indigenous groups," when the Algonquin Peoples' do not consider ourselves a group, but a nation comprised

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<sup>19</sup> *Tsilhqot'in Nation v. British Columbia*, [2014 SCC 44](#), paras 67 to 76.

<sup>20</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 179.

<sup>21</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 179-179.

<sup>22</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 178.

<sup>23</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 178.

<sup>24</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 178.



of individual communities that are nations as well with their own unique rights.<sup>25</sup> Our concern is that CNSC has structured its consultation approach around this concept instead of dedicating resources to meaningfully engage with each individual Nation who is owed the duty. This issue came up in CNSC's consultations on the NSDF project with the Algonquin-Anishinabeg Nation Tribal Council (AANTC) being relied on as a conduit to the obligations the CNSC owed direction to KFN.

We also expressed our hope that developing a CFA by which all future engagements with KFN would be undertaken would allow for the advancement of earlier engagement and the inclusion of more consultation aspects to do with traditional ecological knowledge-sharing and more substantial oral presentations at hearings.<sup>26</sup> All of these aspects have been missing from CNSC's consultation efforts thus far and we take the position that these changes are necessary for the CNSC to fulfill its DTCA and must be guaranteed in advance through the creation of a CFA.

Very recently, CNSC and KFN have agreed to work towards creating CFA. Following this, KFN has taken steps to engage with the CNSC's "consultation" attempts in a good faith attempt to build a cooperative relationship moving forward. KFN's engagement with these "consultation" procedures, including entering into the funding agreement should not be misconstrued as acceptance of these procedures as being sufficient to fulfill the CNSC's DTCA.

Prior to coming to this agreement, KFN made consistent efforts to make its position on the necessity of a CFA known and ultimately honoured. These efforts included dealings with the CNSC, federal ministries, and the CNL. An entire chronology of all meetings and correspondence is not necessary to evidence that KFN has always taken the above position and that the CNSC has failed to respond adequately until very recently. To be clear, KFN has never refused to engage with the CNSC on this project, we have consistently demanded that *how* that engagement occurs be properly in line with the CNSC's DTCA. Abstaining from engaging in inadequate consultation is not equivalent to frustrating consultation, a point which will be elaborated upon below.

Beginning in 2016, KFN was made aware of the NSDF project by the CNSC staff and was asked to participate in the federal EA process. KFN continued to correspond and meet with the CNSC staff from 2017 to early 2020 always with the intention of working with the CNSC to develop a CFA that would fulfil its DTCA.

On November 7, 2019, KFN made a presentation at a CNSC public hearing on the Regulatory Oversight Report on CNL Sites and requested the immediate development of a Nation to Nation CFA or Indigenous Cooperation Agreement in advance of any further environmental assessment work with our community related to the CRL site.<sup>27</sup> We proposed this with "the objective to meaningfully connect Algonquin knowledge and stewardship to the CRL site and long-term management of the Ottawa River and its fisheries."<sup>28</sup> The CNSC Chair ultimately deferred our request to the CNSC Indigenous liaison staff who failed to take any steps to develop a CFA or to meaningfully engage with KFN in the interim, including on engagement on the scope of the EA, until very recently.

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<sup>25</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 179.

<sup>26</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 at p 179-180.

<sup>27</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 starting at p 174.

<sup>28</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 7, 2019 starting at p 180.

KFN wrote with AANTC to the Prime Minister's office on May 14, 2020 expressing our concerns about the inconsistencies with the CNSC's EA processes and the appropriateness of CNSC acting as regulator and assessor with the enactment of the *Impact Assessment Act* ("IAA").<sup>29</sup> In the letter, we reiterated our position that the federal government should prescribe assessment review panels composed of both CNSC members and Minister appointees as per the IAA and as an interim legislative measure as opposed to the CNSC conducting these panels alone. We also requested that the EAs of another project on the CRL site, the Global First Power Micro Modular Reactor, be suspended until adequate provisions for cooperation with us is instigated.

Despite this, we provided comments on CNL's NSDF Unrestricted Indigenous Engagement Report including:

- A reference to our correspondence from May 14, 2020, to the Prime Minister;
- That KFN does not accept the "meager or discretionary consultation methods by the CNSC given the scale and importance of the 'NSDF'" assessments and impacts;
- A request that the hearings be suspended until adequate provisions for cooperation with us are in place;
- Concerns about the CNSC's independence; and
- A demand for the Crown's direct involvement as consultation has been insufficient.

On June 17, 2020, in a meeting with CNL, KFN insisted that as CNL still needs to negotiate individual consultation engagement agreements (CEA) on the NSDF project, the CNSC should not have deemed CNL's Indigenous Engagement Report or the EIS as complete.

On August 26, 2020, KFN and AANTC sent a letter to the Minister of Natural Resources, The Honourable Seamus O'Regan, expressing disappointment with CNSC's conduct regarding another project, the small micro-nuclear pilot reactor development, at CRL. We further expressed our concerns with the CNSC's other activities regarding Chalk river:

"CNSC's conduct in this matter and other pending environmental assessments and licensing decisions for the Chalk River nuclear site namely the, Near Surface Disposal Facility (NSDF) Project and Nuclear Power Demonstration (NPD) Closure Project are far from the model of meaningful engagement and reconciliation you mention in your letter nor, subject to the progressive examples of impact assessments that should be consistent with commitments made by your Ministry."

We then went on to discuss how the CEAA recognizes the need for reconciliation and that "In all projects, the highest standards and best practices to engage and (sic) meaningful (sic) consult and accommodate should be met."

The letter goes on:

"We have provided clear examples to your Ministry underscoring how the CNSC's actions have not been sufficient to discharge the Crown's duty to consult and accommodate. We remain committed

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<sup>29</sup> *Impact Assessment Act*, SC 2019, c 28.

to seeking potential ways for AANTC and KFN to play a meaningful role in the environmental assessment process that reflects improved examples of Crown-Indigenous collaboration in multiple recent Canadian environmental assessment processes.”

At its conclusion, we demanded that the Crown suspend all Chalk River Nuclear Site EA processes until our concerns with them were addressed.

In another letter to the Minister on May 31, 2021, we requested a moratorium on all projects before the CNSC for environmental assessment review considering the failure to consult, accommodate and build positive relationships that the CNSC had demonstrated thus far. We also advised that we would be in touch with Clare Cattryse the Director of Policy for Aboriginal and International Relations for the CNSC to “work towards developing a process whereby the duty to consult has the potential to be met.”

Accordingly, on November 5, 2021, KFN met with Ms. Cattryse and provided a summary of our concerns and demands which had been previously communicated to the CNSC including that:

- The CNSC assessment process is simply not working;
- KFN requests meaningful participation, transparent reciprocal dialogue, and a consultation framework agreement;
- KFN is interested in Indigenous community-led studies and strategies for halting or reversing damage to the Ottawa River watershed and is concerned about cumulative nuclear facility effects, watershed sustainability, and project splitting for the multiple projects at Chalk River;
- EA guidelines and processes should foster respect and inclusion of Algonquin Anishinaabeg traditional law, Indigenous knowledge systems, and the Truth and Reconciliation Commission’s 94 Calls to Action; and
- It is unclear whether AANTC has the mandate from individual First Nation communities to undertake requirements under the CEAA including present on land use and occupancy study and social-cultural assessments and even if they did that the budget for this work is not enough to complete the requirements under assessment with all individual communities.

Ms. Cattryse followed up on this meeting, in an email from November 9, 2021, summarizing the discussions and confirming its view that AANTC was intended to use its funding to coordinate and engage with KFN as part of the NSDF processes. The CNSC reiterated KFN’s position in response that “for the purposes of consultation on CNSC regulatory processes the authority rests with KFN.” Despite this, the email continued that KFN should work with AANTC to determine how the remaining funds would be used to support KFN’s participation and engagement with the remaining phases of the NSDF.

On November 25, 2021, we attended the CNL Regulatory Oversight Review Hearing and reiterated our concerns on the lack of cooperative discussion with KFN in the EA processes and that the CNSC had moved ahead with scheduling the hearings for the NSDF project without properly engaging with KFN.<sup>30</sup>

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<sup>30</sup> Canadian Nuclear Safety Commission Public Meeting Transcript, November 25, 2021 starting at p 154

On December 6, 2021 KFN sent an email to Ms. Cattryse advising that we were still waiting for our funding from the CNSC to develop an action plan and consultation agreement. We understood, based on earlier correspondence, that the CNSC's acknowledgement of our authority as an individual First Nation and rights holder, that we would receive funding separate from that provided to AANTC.

On the same day, Ms. Cattryse followed up to clarify that KFN was meant to work with AANTC to use the remaining funds granted to them to engage in the NSDF process.

AANTC then became involved in the conversation on December 7, 2021, and advised that the CNSC cannot pit the request of one community against the Tribal Council and that "the AANTC cannot be used as a way to skirt the obligation to consult with First Nations, or as an excuse not to provide the funding that they need to conduct studies specific to their interests and concerns." AANTC withdrew from its participant funding agreement with the CNSC following this correspondence.

On January 31, 2022, KFN wrote to the CNSC again requesting that it suspend all hearings in order for a mutually agreeable Consultation Framework Agreement and workplan to be put in place with KFN, which would properly uphold the Honour and Duty of the Crown. We noted that only recently has the CNSC made meaningful efforts to work with us on a CFA and after the hearing dates were set.

In or around August 2021, KFN entered into discussions with CNL about drafting a letter of intent regarding KFN's engagement with all projects at the CRL site. The letter was signed on January 31, 2022.

Once the CNSC became responsive to our demands for a CFA and began engaging actively in this process, productive discussions about how consultations for the NSDF specifically should proceed finally began to take place. This included our entering into a funding agreement with the CNSC, which was finalized this month on April 4, 2022.

The funding agreement is intended to cover a variety of activities, including:

- Reviewing the CNSC staff's Environmental Assessment (EA) Report and related documentation, including CNSC and CNL Commission Member Documents, and commenting on the NSDF's potential impacts on KFN's rights and interests;
- Having our legal counsel review CNSC staff's EA Report and related documentation, including CNSC and CNL Commission Member Documents, and conduct a legal analysis;
- Submitting a plan for community engagement to CNSC staff with proposed community engagement activities leading up to the Commission hearing;
- Conducting community engagement activities and get feedback from KFN community members and leadership on the NSDF Project, inviting CNSC staff where appropriate; and
- Submitting a written report to the CNSC summarizing comments from the review of the NSDF and participate at the Commission hearing.

While KFN agreed to complete the above objectives by signing the funding agreement, our ability to do so prior to the hearing date and within the mandated submission deadlines is unreasonable. Further, KFN was not in a position to undertake these activities before the CNSC provided us with the necessary funding to do so. The 24 days between the execution of the funding agreement and

this submission deadline were beyond insufficient for us to engage in the necessary inquiries in order to make comprehensive submissions today. Consequently, the submissions provided herein are limited.

Despite these limitations, KFN has always provided material in time for the required deadlines. It should also be noted that KFN has requested extensions in these proceedings, which the CNSC failed to respond to in a timely manner. Regardless, KFN continues to meet the submission deadlines set out by the CNSC. Specifically, KFN made a request for the extension of the deadline for filing written submissions on March 31, 2022. After receiving no response, KFN submitted its preliminary written submissions in line with the original deadline of April 11, 2021. Only after follow up and the provision of these preliminary submissions did KFN receive a response from the CNSC Commission Registry and an extension to file its substantial submissions, contained herein, no later than April 28, 2022. The Registry also granted KFN an extension to May 17, 2022 to submit its report on community engagement activities and PowerPoint presentation for the public hearing.

#### Algonquins of Ontario's Participation

KFN does not agree with the Algonquins of Ontario's ("AOO") participation in this process. We have been consistent in stating that there is no such thing as the Algonquins of Ontario. KFN does not recognize AOO as an "Indigenous Organization" or otherwise. Neither KFN nor Algonquin Nation divides itself between Ontario and Quebec. It is KFN's position that AOO is a legal and policy creation designed to overtake our own Indigenous community engagement.

KFN does not accept or acknowledge any claims to Aboriginal or treaty rights made by AOO or recognize it as an entity entitled to the DTCA in any decision making on Algonquin Anishinaabeg lands. We have become aware that AOO, Atomic Energy of Canada Limited and CNL signed a tripartite Memorandum of Understanding in 2018 regarding development at the CRL site. This situation remains to be reconciled with true Algonquin rights and titleholders. Furthermore, we reject the AOO having a "[naming ceremony](#)" for the new entrance to the Chalk River facility, calling it "Minwamon," meaning "Clear Path."

#### CNSC's Duty to Consult and Accommodate KFN Has Not Been Fulfilled

The Crown's, and in this case the CNSC's, DTCA owed to KFN applies and is triggered by the CNSC's decisions under the CEAA and NSCA. In light of KFN's rights with respect to the affected lands and the serious potential impact the NSDF project may have on them, the duty owed here falls on the high end of the spectrum and the CNSC has not undertaken the deep consultation required in this case.

#### *The Duty Applies*

As per its enacting legislation, the CNSC "is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty."<sup>31</sup> As an agent of the Crown, the CNSC "acts in place of the crown" and is "indistinguishable from [the Crown], and as such, can owe a duty to consult."<sup>32</sup> There is no dispute about whether or not the CNSC is responsible for the DTCA in this

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<sup>31</sup> *Nuclear Safety and Control Act*, s 8(2).

<sup>32</sup> *Peter Ballantyne Cree Nation v Canada*, [2016 SKCA 124](#) at para 61.

case. The CNSC has expressly acknowledged that it owes a DTCA to First Nations affected by the NSDF project, including KFN.<sup>33</sup>

### *The Duty is Triggered*

The DTCA is triggered when “the Crown has knowledge, real or constructive” of Aboriginal and/or Treaty rights, and “contemplates conduct” which might “adversely affect” those rights.<sup>34</sup> The CNSC, has again, explicitly recognized that the duty is triggered here. The CNSC’s CMD for the NSDF project states, “Both the EA and licensing decisions trigger the Crown’s duty to consult, and where, appropriate, to accommodate Indigenous peoples whose potential or established Indigenous and/or treaty rights, under section 35 of the *Constitution Act, 1982*, have the potential to be impacted by the proposed NSF project.”<sup>35</sup> Importantly, KFN is included in the list of Indigenous Nations whose traditional territories the NSDF project is being proposed on; however it is not given its own section in the EAR, and is instead listed as a member of the Algonquin Anishinabeg Nation Tribal Council.<sup>36</sup>

### *The Duty Falls on the High End of the Spectrum*

The scope of the DTCA lies on a spectrum.<sup>37</sup> Determining where the duty falls in any given case depends on the strength of the rights claim, the scope of the Aboriginal right, and the potential infringements on the rights.<sup>38</sup> If the duty falls on the low end, the content of the duty may be to provide notice and information and discuss any issues raised in response.<sup>39</sup> Conversely, if the duty falls on the high end of the spectrum, deep consultation is required.<sup>40</sup>

When deep consultation is required, the Supreme Court of Canada discussed the following indicia for this level of consultation having being met:

- “the opportunity to make submissions for consideration;
- “formal participation in the decision-making process;
- “provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
- dispute resolution procedures like mediation or administrative regimes with impartial decision makers.”<sup>41</sup>

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<sup>33</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 126.

<sup>34</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 35.

<sup>35</sup> Canadian Nuclear Safety Commission, Commission Member Document for “A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site”, January 24, 2022 at p 13.

<sup>36</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 125.

<sup>37</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#).

<sup>38</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at paras 43-44.

<sup>39</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 43.

<sup>40</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 43.

<sup>41</sup> *Coldwater First nation v Canada (Attorney General)*, [2020 FCA 34](#) at para 41.

Here, the CNSC's duty falls on the high end of the spectrum and requires deep consultation. The SART evidences our strong prima facie case for both the Aboriginal and title rights. Further, these rights are wide in scope covering our use, enjoyment, occupancy and decision-making rights that flow from our title. No treaties were signed by us in relation to our land and these rights remain unextinguished. KFN has not brought an Aboriginal rights claim through the Canadian courts as we have had no reason to, but we would easily be able to prove our inherent section 35 rights under the relevant test. This test requires the court to "examine the pre-sovereignty aboriginal practice and translate that practice into a modern legal right" by considering the characterization of the right, its location, whether it was exercised prior to European contact, whether it is "integral to our distinctive culture" and the continuity of the exercise of the right.<sup>42</sup> Our rights set out in the SART, including our rights to harvest, gather and use the land stem from the fact that we have been on the land since time immemorial. They have been extensively characterized throughout the SART, as have the fact that they were and continue to be integral to our distinctive culture.

Unfortunately, the potential infringements on our rights by the NSDF project is impossible for us to comment on without having the opportunity to undertake the necessary due diligence required by these submissions. However, looking to the CNSC's EAR, the adverse impact to the environment generally can be used to understand the potential adverse impacts to KFN's rights.

Of particular concern is the proposed site's proximity to and interaction with the Ottawa River. The site is directly adjacent to the River and "contains several small drainage basins that drain directly or indirectly" into it.<sup>43</sup> Additionally, the Perch Creek and Perch Lake watersheds are located just southwest of the project site. These watersheds have been adversely impacted in the past by plumes coming from the CRL's waste management areas and Liquid Dispersal Areas. The rapids at Cotnam Island are also located 40 kilometres downstream of the site and control the water level in the River.

Impacts to our waterways are just one area of concern. A skim of the CNSC'S EAR provides a wide range of potential impacts of the NSDF Project on the surrounding environment, including:

- "Change to air quality due to an increase in emissions, including dust and greenhouse gasses (GHGs), associated with construction and operations activities";<sup>44</sup>
- "Changes to surface water quality" as a result of the degradation of the barriers of the NSDF post-closure, "resulting in increased infiltration of surface water to the emplaced waste";<sup>45</sup>
- "Changes to downstream discharge patterns";<sup>46</sup>

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<sup>42</sup> *R v Marshall*; *R v Bernard*, [2005] [2 SCR 220](#) at para 51 see also: *R v Sparrow*, [1990] [1 SCR 1075](#); *R v Van der Peet*, [1996] [2 SCR 507](#); *R v NTC Smokehouse Ltd.*, [1996] [2 SCR 672](#); *R v Gladstone*, [1996] [2 SCR 723](#); *R v Nikal*, [1996] [1 SCR 1013](#); *R v Pamajewon*, [1996] [2 SCR 821](#); *R v Adams*, [1996] [3 SCR 101](#); *R v Côté*, [1996] [2 SCR 139](#); *Mitchell v. MNR*, [2001] [1 SCR 991](#); *R v Powley*, [2003] [2 SCR 2007](#); and *R v Sappier*; *R v Gray*, [2006 SCC 54](#).

<sup>43</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 47.

<sup>44</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 49.

<sup>45</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 53.

<sup>46</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 53.

- “Loss of terrestrial habitat and vegetation communities due to vegetation clearing and grubbing” due to the 33 hectares of forested ecosystem cleared for the construction of the project;<sup>47</sup>
- “Changes to habitat quality and function from NSDF Project activities during construction and operations phases”;<sup>48</sup>
- “Changes to groundwater flow”;<sup>49</sup>
- “Changes to groundwater quality”;<sup>50</sup>
- “Fish habitat loss and alteration”;<sup>51</sup>
- “Changes to fish health” including those to the four species of fish with conservation concern;<sup>52</sup>
- “Habitat loss and alteration for migratory birds” including those in the local study area that have been identified as species at risk;<sup>53</sup>
- “Sensory disturbance of migratory birds throughout the construction, operation and closure phases” again including the identified species at risk;<sup>54</sup>
- Human “exposure to air and water non-radiological contaminants by inhalation and ingestion”;<sup>55</sup>
- Human “external and internal exposures to radiological contaminants”;<sup>56</sup>
- Greenhouse gas emissions from decomposition of the waste on the site;<sup>57</sup>
- Impacts on species at risk including bats, Blanding’s turtle, eastern milksnake and monarch butterfly;<sup>58</sup>
- Impacts from potential accidents and malfunctions; and<sup>59</sup>

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<sup>47</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 63.

<sup>48</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 63-64.

<sup>49</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 70.

<sup>50</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 70.

<sup>51</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 75.

<sup>52</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 75, 76.

<sup>53</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 81-82.

<sup>54</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 81-82.

<sup>55</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 90.

<sup>56</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 90.

<sup>57</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 96-97.

<sup>58</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 100-107.

<sup>59</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 107-112.



- Cumulative environmental effects.<sup>60</sup>

These potential environmental impacts must be considered in light of the immense lifespan of a nuclear project like the NSDF. NSDF's impacts will begin with its construction and will continue for hundreds of years after the facility is closed. Specifically, the operations of the NSDF will last at least 50 years with the decommissioning phase expected to last 30 years and the post-closure phase extending for at least 300 years.<sup>61</sup> The impacts of the NSDF project are not only wide in scope, they have the potential to last for hundreds and hundreds of years.

### *The Duty Has Not Been Met*

While the CNSC staff have recommended that the Commission determine that the NSDF project is not likely to cause significant adverse environmental effects referred to in the CEAA and conclude pursuant to the NSCA that CNL's application with respect to the NSDF should be approved, the Commission cannot make this determination and fulfil its DTCA absent KFN, Wolf Lake First Nation, Algonquins of Barriere Lake and Kitigan Zibi input. The Commission simply does not have all the information it needs to make these determinations. Both KFN and other excluded Algonquin communities' lack of opportunity to provide this input and CNSC's resulting inability to consider and address this information mean that the DTCA has not been met.

Engaging in a "meaningful two-way dialogue" is required by deep consultation.<sup>62</sup> This dialogue is essential in order for any accommodation provided by the crown to have a nexus with the First Nation concern.<sup>63</sup> "Consultation in its least technical definition is talking together for mutual understanding" and it requires a "mutual understanding on the core issues" including the potential impact on rights, which has not occurred here.<sup>64</sup> While the creation of a CFA is a step in the right direction to allow for this two-way dialogue, none of the "consultation" steps taken by the CNSC thus far have facilitated this. We have been clear from the beginning that the "consultation" processes the CNSC has relied on are inadequate and we have explicitly pointed out what changes can be made to rectify this. It must be emphasized that CNSC's inquiries under the DTCA are not into environmental impact or the safety of a proposed project, "it inquires into the impact on the right."<sup>65</sup> The CNSC is not in a position to consider the impact of the NSDF project on KFN's rights without this two-way dialogue. It is not sufficient for the CNSC to rely on its EAR for generic impacts on the environment and then claim that considering and responding to those impacts addresses potential impacts to KFN's rights.

First, KFN has not had the opportunity to review any of the documents that the CNSC staff based its recommendations on or to undertake our own studies in order to provide input on these determinations considering the adverse impact the project may have on our rights. Together, CNL's EIS and CMD and CNSC's CMD total 2,422 pages. In part, these documents are meant to address impacts to our rights. Not only can CNSC not address First Nations' concerns through document

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<sup>60</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 120.

<sup>61</sup> Transcript of February 22, 2022 Part 1 of CNSC Public Hearing at p 23-24.

<sup>62</sup> *Squamish First Nation v Canada (Fisheries and Oceans)*, [2019 FCA 216](#) at para 63.

<sup>63</sup> *Squamish First Nation v Canada (Fisheries and Oceans)*, [2019 FCA 216](#) at paras 71-79.

<sup>64</sup> T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49 at p 61.

<sup>65</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 49.

<sup>66</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 45.

dumping, but none of these documents can be said to have properly addressed impacts to KFN's rights without having considered our actual input on this topic.<sup>67</sup> With the funding agreement only being executed earlier this month, KFN did not have the resources to undertake these studies and assessments. As a result, all of the assessments and conclusions made by the CNSC staff have been made without KFN's input and unilaterally. Despite this, the CNSC staff still ask the Commission to make their determinations based on this inadequate information. In the CNSC staff's EAR, they reference some of the comments we provided on the draft EIS with respect to our harvesting rights and determined that despite our concerns, "it is expected that the magnitude of changes from the current baseline conditions as a result of the Project on the ability for Algonquin First Nations' in Quebec to access harvesting locations would be low. [...] [The project] is likely to have little additional or new impact on the exercise of hunting rights in the RSA, compared to the current baseline conditions. Therefore, the potential overall severity of this impact pathway is assessed as low for the proposed NSDF Project."<sup>68</sup> On the basis of a number of these "assessments", CNSC staff ultimately come to the conclusion in their EAR that, "Based on the information gathered throughout the environmental assessment process, CNSC staff have found that the potential impacts identified as a result of the NSDF Project on the Algonquin First Nations in Quebec, including Kebaowek First Nation and KZA, are considered to be of overall low severity."<sup>69</sup> The fact of our rights being assessed with the rest of Algonquin First Nations speaks to the lack of consultation undertaken and entirely mischaracterizes the nature of our rights as an individual First Nation. CNSC staff are unable to properly identify KFN's rights let alone come to any conclusions on potential impacts to them.

While CNSC staff are satisfied with their analysis, KFN has not had the resources or opportunity to study and consider the project's potential impacts on its harvesting or any other rights. KFN has not completed a land use, occupancy study, traditional knowledge study, cumulative effects study or aquatics species at risk study on the affected area and this assessment was done absent any information of KFN's land use. Accordingly, this convenient conclusion reached by the CNSC staff is irrelevant at best and misleading at worst.

The CNSC staff also deemed mitigation measures deemed sufficient to address the project's environmental impacts without KFN's input. KFN has had no say in how the mitigation measures were decided upon nor had any time to consider the adequacy of these measures. From a preliminary reading of the CNSC staff's EAR, the mitigation measures identified are not sufficient in any event. For example, to address changes to groundwater flow, the CNSC staff's EAR simply states "NSDF designed to limit disturbance to the natural environment."<sup>70</sup> From the cursory overview of these documents that could be managed in the time available, it becomes clear that the Commission cannot rely on them to make the determinations recommended by the CNSC staff. The Commission does not have the information it requires to reasonably conclude that the statutory requirements and the DTCA are made out.

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<sup>67</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 49.

<sup>68</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 140.

<sup>69</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 144.

<sup>70</sup> Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 71.

### Conditions Under CEAA Cannot Be Met

Just as the CNSC's DTCA to KFN has not been met, neither are the requirements under the CEAA. An EA decision under the CEAA on whether the proposed NSDF project is likely to cause significant adverse environmental effects cannot be made due to the lack of consultation with KFN.<sup>71</sup> The CNSC cannot satisfy itself that all the environmental effects required to be taken into account under section 5 have been met. Specifically section 5(1)(c) of the Act sets out the environmental impacts with respect to "aboriginal peoples" that must be considered in relation to any act subject to it:

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.<sup>72</sup>

In all the ways that the CNSC did not fulfil its DTCA with KFN, it also failed to fulfil its requirements under this section of the CEAA. This section of the CEAA requires the consideration of impacts to First Nations as part of the environmental impacts to be taken into account. Again, the Commission cannot satisfy itself that these factors under section 5 have been met because they do not have the requisite information from KFN in order to make this assessment.

### KFN Has Not Frustrated Consultation

There is a requirement regarding a First Nations' involvement in the DTCA that, "Indigenous grounds 'must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached [...]" though "hard bargaining on the part of Indigenous groups is permissible."<sup>73</sup> The CNSC cannot take the position that procedural issues, be it unanswered emails, missed deadlines or miscommunications with respect to the structure of a participant funding agreement, "frustrate" consultation and that, consequently, the Crown cannot be found responsible for the DTCA not being met. This flies in the face of the reconciliatory purpose of the duty and its constitutional nature.

The DTCA's constitutional nature stems from the Honour of the Crown. It would be entirely dishonourable to blame KFN for any practical challenges it faces with engaging in consultation, as a direct result of the legacy of colonialism that colours the Crown/Aboriginal relationship. KFN

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<sup>71</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.

<sup>72</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 5(1)(c).

<sup>73</sup> *Coldwater* at para 195 citing *Haida* at para 42.

cannot come to the table exactly as the Crown may wish because it does not have the resources of the Crown. The CNSC failed to provide any funding to KFN directly until April 4, 2022, to undertake any of the measures required to properly engage in this process, leaving KFN with no choice but to bear the cost of these engagements ourselves if we wished to do so in due time. In *Saugeen First Nation* the court accurately summarized the disparity in resources between an affected First nation and those undertaking the project and consultation:

“SON (Saugeen First Nation) has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent’s desire to pursue a project, usually for gain, and the Crown’s desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON’s general resources in these circumstances.”<sup>74</sup>

Further, the issues in communication between KFN and the CNSC are largely attributable to the ways in which the CNSC attempted to “engage” with us. The Ontario Superior Court considered the Crown’s duty to engage meaningfully considering “the cultural context of the engaged Indigenous form of communication and consultation where the emphasis is on speaking and active listening with a view to developing a mutual understanding and, hopefully, a resolution.”<sup>75</sup> By pushing forward with the processes that it saw fit instead of seriously considering KFN’s position on the creation of a CFA, the CNSC engaged in superficial “communications” with us in advancement of the process that it unilaterally determined to be sufficient.

In its EAR, the CNSC staff claim that no response was received from KFN to its offers to collaborate.<sup>76</sup> This a blatant mischaracterization of what actually occurred. As detailed extensively and above, KFN made clear from the beginning its position on how the CNSC could best collaborate with us in a way that fulfilled its DTCA through the creation of a CFA. When our input continued to be ignored by the CNSC and offers to “collaborate” were only being made within the context of the existing and inadequate processes, KFN was forced to engage with other government actors in order to ensure adequate consultation, though in the end that process was started too late.

## Conclusion

The Commission is not in a position to make either of the determinations required in order to approve CNL’s application. The CNSC has not fulfilled the DTCA with KFN and consequently, it cannot satisfy itself that the requirements under the CEAA or the NSCA have been met. The Commission has no option at this point but to either deny CNL’s application or defer its decision to allow for the proper fulfillment of its DTCA. Proceeding otherwise would result in the Commission’s violation of the Crown’s constitutional obligations and potentially the greater and unknown impacts to both the environment and our inherent and projected rights.

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<sup>74</sup> *Saugeen First Nation v Ontario (MNR)*, [2017 ONSC 3456](#) at para 159.

<sup>75</sup> *Ginoogaming First Nation v Her Majesty The Queen In Right of Ontario et al.*, [2001 ONSC 5866](#) at para 91.

<sup>76</sup> Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 139.