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Supplementary Information

Oral presentation

Written submission from the Mitchikanibikok Inik, Algonquins of Barriere Lake

Renseignements supplémentaires

Exposé oral

Mémoire des Mitchikanibikok Inik, Les Algonquins du Lac Barrière

In the Matter of the

À l'égard des

Canadian Nuclear Laboratories (CNL)

Laboratoires Nucléaires Canadiens (LNC)

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

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

Commission Public Hearing
Part 2

Audience publique de la Commission
Partie 2

May 30 to June 3, 2022

30 mai au 3 juin 2022

Canada

MITCHIKANIBIKOK INIK
Algonquins of Barriere Lake
Les Algonquins du Lac Barrière

May 4, 2022

BY EMAIL: Interventions@cnsc-ccsn.gc.ca

Mr. Denis Samure
Senior Tribunal Officer, Secretary
Canadian Nuclear Safety Commission
Ottawa ON

RE: Near Surface Disposal Facility (NSDF) Hearing Submission

Introduction

These submissions are provided by the Mitchikanibikok Inik (also known as the Algonquins of Barriere Lake "ABL") regarding Part 2 of the Canadian Nuclear Safety Commission's (CNSC) licensing hearings for Canadian Nuclear Laboratories' (CNL) proposed Near Surface Disposal Facility (NSDF) scheduled to begin on May 31, 2022. We wish to intervene in response to the CNSC's Revised Notice of Public Hearing regarding the NSDF project.

The NSDF project is located within our traditional Algonquin unceded lands and we, the Mitchikanibikok Inik, are extremely concerned about the proposed project's potential impacts to our lands, waterways, rights, and way of life. We do not consent to the project, which, if built, would violate both our sovereignty and our law-"Ona'ken'age'win". We have a sacred obligation to protect and steward our lands and waters. We do not accede to Canadian state law as determinative of the NSDF's legality. In submitting these comments, the Mitchikanibikok Inik should not be construed as accepting or supporting the project or the CNSC's impact assessment regime in general. In order to safeguard this situation we request that this presentation is recorded as a consultation under protest.

However, even if ABL did recognize Canada's jurisdiction to make these determinations, the CNSC acting as the Crown has not fulfilled its Duty to Consult and Accommodate (DTCA) owed to us. Never once was ABL directly contacted or consulted by the CNSC or CNL. Further, we were never consulted regarding our preferred method of engagement. At no point did the CNSC make meaningful efforts to remove barriers to our participation in the Indigenous engagement process. Instead, this proceeding has pushed forward without any participation on our part. If the CNSC makes a final determination on this basis, it will violate its DTCA owed to us.

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 Environmental Assessment (EA) for the NSDF and determined that the information provided is complete and that the final EIS is acceptable.[1] 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 CEAA.[2]

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).[3]

The CNSC has not fulfilled its DTCA as we have not been engaged at all in any of the processes leading up to this hearing.

ABL 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 ABL and the CNSC to negotiate the proper assessment framework wherein our jurisdiction is recognized as equal, if not paramount to that of Canada, and
- Protect the Ottawa River watershed from nuclear waste contamination

<u>United Nations Declaration of the Rights of Indigenous Peoples</u>

Although the mandate of the CNSC does not mention examining 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.[4]

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

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[1] 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>.

[2] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p iv.

[3] 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.

[4] 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.

use of water resources. In fact, States such as Canada should be engaged in good faith processes with Indigenous 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."[5]

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.[6]

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."[7]

Further, Article 11 recognizes our right to culture:

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[5] 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.

[6] 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.

[7] 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.

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 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."[8]

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."[9]

The social, political and economic organization of the Algonquin Nation was focused around waterways, which acted as our transportation routes and family land management units. The Ottawa River Watershed, now included in the provinces of Quebec and Ontario was "settled" under the colonial doctrine of discovery which is woven throughout the Canadian legal system and jurisprudence of the Supreme Court of Canada up to today and reflected in Canadian policy and the reality that Indigenous Peoples face on the ground. This not only constitutes racial discrimination, it violates our indigenous and most fundamental human rights and international oversight is required.

Whereas, Canada adopted UNDRIP standards and Bill C-15 passed on May 25, 2021delivers on the Government of Canada's commitment to introduce legislation to advance implementation of UNDRIP before the end of 2020, the gap between the implementation of UNDRIP, and the realities of the NSDF consultation remain considerable. ABL therefore, offers this critical approach to UNDRIP and its implementation. In doing so, we wish to move from the normative discussions of UNDRIP as an armchair discussion to ideally a practical negotiation about how articles of UNDRIP are practiced and grounded legally, politically as well as institutionally in the NSDF consultation. In the evolving context of Canada adopting UNDRIP, we would like a response from the Commission as to what extent will:

1. the CNSC will engage free, prior, informed consent in the NSDF project review?
2. will the commission engage gender based analysis to support the past, present, and future relationship of Algonquin women as "waterkeepers" in the watershed?
3. the Commission recognize the relationship of sacred sites on waterways such as Ouiseau

[8] 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.

[9] 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.

Rock across from Chalk River in this assessment?

4. the distinctive Indigenous relationship or the principle of sustainability inherent in the international Indigenous environmental ethic of "responsibilities to future generations" be respected?
5. accept our jurisdiction?

ABL's Relationship to the Affected Territory

ABL is a member of the Algonquin Nation, which is comprised of eleven distinct First Nations, who are recognized as bands under the *Indian Act* and who have traditionally used and occupied Algonquin lands where we continue to live today.[10] Separate and apart, 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.[11]The Algonquin Nation has never ceded or surrendered our inherent title or jurisdiction to our traditional lands. Our traditional lands spans over what is now the Ontario-Quebec border and includes all the waterways within the Ottawa River, watershed, which we know as Kichi Sipi (which translates to "big river").

We have lived in the Kishi Sipi watershed from time immemorial. Our history is oral. Our lands and waters are part of the Anishinaabeg Aki, a vast territory surrounding the Great Lakes in North America. We have always relied on these lands and waterways in exercising our inherent rights governed by our customary law and governance known as "Ona'ken'age'win". This law is based on principles of mobility, freedom to hunt and gather and the sustainable reliance on our territory in stewardship for future generations. Our members can trace their ancestry and uninterrupted use and occupation of the land to time immemorial. We continue to engage with our traditional ways, retain our cultural base and speak our native language, "Anishinaabemowen Eh-shi-gii-sheh-wiin". We also continue to use our lands and the resources it provides to hunt, fish and gather for sustenance. We rely on the land for our life and our livelihoods.

The Algonquin Nation have been on the territory for over 8000 years. Neighbouring nations includes Mohawks to the south, Attikameq Nation to the East, and Cree Nation to the North. Mitchikanibikok is located 30 km north of Barrière Lake Community, it is the traditional settlement of the Algonquins of Barriere Lake "Mitchikanibikok Inik". "Mitchikanibikok Inik translates to the Stone Weir People and refers to a traditional fishing technique that was used to barricade the fish using a stone weir. The traditional territory is 10,000^{2}km as stipulated in the trilateral agreement traditional territories map. The Hudson Bay Company established a trading post at Barrier Lake in 1873 during the fur trading era but relocated to (original) Barrière Lake (Kitiganik: gardening potatoes) in 1874 due to fire destruction. We followed as we became dependant on the company for fur trading, food and other necessities. Before the construction of the Cabonga Reservoir our people were able to cross the Barriere Lake Bay. Barrière Lake got its name after one of the many Lakes and rivers that was submerged to create the Cabonga Reservoir for transportation of logs in 1920's. Today our community is only 29,7 hectares but planning expansion, We are located within the boundaries of the Parc La Vérendrye Wildlife Reserve that is 374 km north of Montreal on highway 117, and 158 km south of Val-d'or. Our reserve at Rapid Lake is about 3 ½ hours north of Ottawa, on the Cabonga reservoir. We have over 750 members.

[10] *Indian Act*, RSC 1985 c I-5.

[11] *The Constitution Act, 1982,* Schedule B to the *Canada Act*, *1982* (UK), 1982, c 11, ss 35.

The community of Barrière Lake was created in 1929 but it wasn't until 1961 that it was recognized by the federal government as the official residency of the Algonquins of Barriere Lake. Our community is very authentic, our people thrive on preserving our culture, traditions and language. Our way of life is based on the land and we continue to pass on our skills of hunting, trapping and fishing, and our traditional knowledge and skills to the younger generation. There are many traditional stories of the land that still resonate with our community members today. The Algonquins of Barriere Lake are known as canoe builders, the Traditional Chief of Barriere Lake was named David Makocoose who was very gifted in canoe building. Below is a photo taken in the late 1920's.

Our community currently has carried on this craft and we have many gifted knowledge keepers who specialize in canoe building. Mitchikanibikok have acquired traditional knowledge of harvesting wild game, moose hide tanning, making maple syrup, basket making, snowshoes, toboggan, cradleboard craftmanship, knowledge of traditional medicines and much more that demonstrates us as a distinct society. The Wampum belts are of great political and diplomatic significance, they represent our interpretation of our relationship and agreements between the French speaking Nation, the English speaking Nation and the Anishinaabeg Nation. The wampum belts demonstrate we are an organized society with a traditional system of governance.

The picture below was taken in 1923 of the Mitchikanibiok families as keepers of wampum belts. Pierre Wawatie on the far right of the picture is holding the 3 string wampum representing the family structure with the strings representing the man, the woman and the child. In our language "Abinogitc" means "the children" or in reality watch out for your children that is interpreted as look after your future.

ABL has always taken on our role as protectors of the land and resources on our traditional territory seriously. The community has been dealing with issues that go against our values and has been protesting to protect our land resources particularly with logging, hunting and fishing, and Hydro Quebec developments. Many community members live off the land today to protect the land. The Algonquin of Barriere Lake Traditional Territory lies in the heart of SEPAQ Wildlife Reserve of Parc La Verendrye. Other historical encroachment included the Beaver Preserve and the Quebec Trap line System set up via encroachment by colonized state settlers, "kamoganik" with their laws and policies that have continued to erode both our land base and our sacred connection to the land.

Our lands and resources have been dispossessed by Quebec and Canada. Our people live mostly in poverty. We have high unemployment because we have been marginalized and subjugated from the development of our traditional lands. For generations we have tried to resolve these issues with Canada and Quebec. There have been times of conflict but we have always tried to solve our issues through negotiation. In 1991, we signed an agreement with Canada and Quebec to negotiate the management of lands in our territory. In 1997, we signed another agreement with Canada, to rebuild our community. Canada walked away from those agreements in 2001 and refused to negotiate. The proposed Tri-lateral Agreement was a model for implementation of consultation and accommodation as per Supreme Court Haida decision (2004). Then, in 2006 Canada imposed Third Party Management (TPM) on our community, and four years later they removed our customary system of government and imposed the Indian Act election system on us. These policy impositions are incongruent with our laws and ways of being. The federal government's TPM controlled all aspects of our community's programs and services since 2006. There was no accountability to our people. Canada made our system of governance almost irrelevant, since too many decisions were made by the TPM without any consultation with us. Taken together, those events increased our hardship and poverty. We had to ask ourselves why the government of Canada would take control away from our people and impose a TPM that actually made our lives worse. They seemed happy to let this go on forever. So, in 2016 we sued Canada in Federal Court so that our people can take back control over their lives. We proved this right to self-determination. We

always hear that First Nations must be accountable and transparent. We ask the Commission how come Canada and its institutions can get away without being accountable and transparent to our people?

For ABL the starting point in this conversation is recognizing that Algonquins, like all First Nations in Canada, began with both rights to their territories and rights as people governed under our own laws. Our Algonquin claim researcher Dr. Sue Roark-Calnek (2013:13) explains that mutuality, respect and consultation are integral to Algonquin social and political organization on a number of levels: family to family, band to band, and nation to nation. From an Algonquin perspective, the current CNSC NSDF review process should be harmonized with that expectation.

ABL has witnessed our environment suffer the negative impacts under exploitative resource development regimes. Much of our traditional territory and livelihoods have been significantly degraded and many ecosystems have permanent or severe damage. We demand cumulative effects be addressed. We can no longer drink out of the Ottawa River. Radioactive nuclear compounds pose serious human, animal and fish health risks through any exposure and bio-accumulation along the food chain.

Our community has deep-seated ecological and environmental knowledge, acquired through long and intimate association with the Kitchi-Sibi (Ottawa River) and surrounding sacred sites. Yet CNL has gone ahead and completed its baseline studies in the absence of any Mitchikanibikok Inik input and the CNSC deemed this environmental impact statement complete, completely without our participation. One major area of uncertainty has been the role played by authentic Indigenous knowledge, jurisdiction and language in this assessment process.

ABL's Rights Flowing from Title

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;
3. enjoy and occupy the land;
4. possess the land; and
5. pro-actively use and manage the land.[12]

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 that 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 ABL on our constitutionally protected Aboriginal rights to engage in activities such as fishing, hunting, trapping, and gathering.

ABL'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

[12] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 , paras 67 to 76.

surrendered by treaty. While the site in question is not within ABL's title territory, the impacts from 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 and ABL asserts and exercises authority, jurisdiction and stewardship over lands threatened by the NSDF proposed project.

Algonquins of Ontario's Participation

In 1983, without any agreement with our Algonquin First Nations, Pikwakanagan (Golden Lake) submitted a land claim to the Ontario side of the Kichi Sibi (Ottawa River), which the government of Ontario accepted for negotiations in 1991 and the federal government accepted for negotiations in 1992. Following the acceptance of the land claim for negotiations the governments of Ontario and Canada fabricated the "Algonquins of Ontario" (AOO) for the purposes of negotiating the extinguishment of Algonquin Aboriginal Title and Rights in the Province of Ontario. The federal government has known for at least 21 years that there are overlapping territorial interests among the Algonquins on both sides of the Ontario - Quebec boundary. In 1994, two years after it had commenced tripartite negotiations with Ontario and the Algonquins of Golden Lake (now Pikwakanagan), Canada commissioned an assessment of the state of Algonquin research, which was carried out by ethnohistorian James Morrison. His report, which is dated September 1994, spoke directly to the matter of overlaps:

"There are also areas of overlap within what might be broadly defined as Algonquin territory. Algonquin claims in Ontario are not neatly confined to the community of Golden Lake. All the communities under study except Winneway assert some sort of traditional claim to lands on the Ontario side of the Ottawa River, both between Pembroke and Mattawa, and from Mattawa to Lake Temiskaming and beyond."[13]

Over the years, they have expanded the definition of who is entitled to participate in these negotiations, to the point where Pikwakanagan is now outnumbered by nine groups made up of mostly unregistered individuals who claim some Algonquin ancestry or connection. Out of the 7,714 people on the AOO voters' list, some 3,016 voters (39%) have had no intermarriage with anyone of Algonquin ancestry for 200, and in some cases over 300 years. At least hundreds more have had no intermarriage with anyone of Algonquin ancestry for between 100 and 200 years. In contrast, the registered members of Pikwakanagan make up less than 10% of the voters list. These large numbers of "instant Algonquins" undermine the legitimacy of the AOO negotiations and threaten the interests of legitimate rights-holders.[14]

ABL has never authorized any body or group, including the AOO, to negotiate on our behalf with respect to our communities' rights in Ontario at Chalk River. Furthermore, there are unsettling questions around the sweeping scope of the definitions used in the AIP with respect to who is an "Algonquin". We do not agree with the AOO participation in this process. We do not acknowledge the pop up "popcorn" Indigenous group and are appalled that they entered into a Relationship Agreement with Canadian Nuclear Laboratories (CNL) in 2018 and have held a naming ceremony at the entrance to the Chalk River Nuclear Complex and recently named a CNL building

[13] James Morrison, "Quebec Algonquin Historical Research: An Assessment". Prepared for INAC, 30 September 1994, at p iii.

[14] Algonquin Nation Secretariat, "150+ YEARS OF COLONIZATION = RACIAL DISCRMINATION SHADOW REPORT BY THE ALGONQUIN NATION SECRETARIAT ON CANADA'S ONGOING COLONIZATION OF INDIGENOUS PEOPLES TO THE UN CERD COMMITTEE" July 2017

"Minwamon".[15] ABL is wondering what this word is and we speak or language. It almost means, "I find that attractive or appealing". We support Chief Haymond in his press release that "This announcement comes at the expense of Kebaowek First Nation and other Algonquin Nations who are the rightful title holders,"[16] This is not a "good path", the AOO does not have ceremonial naming, or any jurisdiction on Algonquin lands. This is an assault on Algonquin sovereignty, "Ona'ken'age'win"and the protection of land, air and water. The cumulative policy effect of acknowledging AOO is silencing legitimate Algonquin Rights and Title holders as the NSDF development proceeds under false Indigenous relations.

ABL's Concerns with the Process Thus Far

ABL is concerned about potential risks of the NSDF to future generations. We are concerned about the possibility of seismic or climate events or major accidents related to flooding and things that may go out of control. We are also concerned about what ABL will be able to do in the event of further radionuclide contamination in the Ottawa River.

The other question we want to raise is how CNL and AOO benefit from all of this—what was the offering that led to their naming a building on the Chalk River site? What big golden carrot was dangled in front of them to name a building at the Chalk River site "Clear Path" in exchange for ABL and every other overlapping Indigenous rights holder to accept the risks of the NSDF project without being consulted?

ABL would encourage the CNSC to do your due diligence in accordance with the United Nations Guiding Principles on Business and Human Rights regarding this occurrence and CNL in advance of the NSDF licence decision. ABL would also like to be supported in our own due diligence in this matter as we have no details on the GoCo arrangement between AECL and CNL and SNC Lavalin and other foreign investors in this project yet we are expected to burden the transportation of nuclear waste as well as the location of this nuclear waste disposal site on our lands. We know nothing about these investors yet they are advancing their own capitalistic structures in exchange for what risk to our territory. CNL must show and demonstrate human rights due diligence- a policy commitment to human rights. CNL has offered no dialogue to repair the harm that has been done in allowing AOO to name a building without consensus of our Algonquin Nations. This is completely outside Algonquin Protocol and in our view offers more proof that AOO are not, in fact, Algonquins.

[15] https://www.pembrokeobserver.com/news/local-news/algonquins-of-ontario-honour-aecl-and-cnl-with-name-for-new-site-entrance-building-at-chalk-river

[16] Pembroke Observer and News, "Kebaowek Algonquin First Nation upset over Algonquins of Ontario's naming of CNL building" Dec 14, 2021 last accessed May 03, 2022

The CNSC's Failure to Engage with ABL

In our experience as a recently elected Chief and council (March 2021), the CNSC has not once reached out to ABL directly or made any efforts to engage with us considering our preferred style and mode of communication. We would expect the CNSC to develop outreach methods tailored to Indigenous communities from whom you have not yet heard. Instead, the CNSC and CNL reached out to the Algonquin Nation Secretariat (ANS) without receiving any response from the ANS.

Consequently, any issue that the CNSC or CNL takes with ABL's "lack of participation" is moot. ABL was never given an opportunity to engage. The CNSC and CNL just assumed that ANS represented our interests without ever having communicated with us directly and then assumed that ANS' unresponsiveness represented our unwillingness to engage. The CNL baldly asserts in its IER that ANS represents us as one of three federally recognized Algonquin Communities in Quebec along with Timiskaming First Nation and Wolf Lake First Nation. In fact, in the CNL Indigenous Engagement Report (IER), it notes that while ABL was represented by ANS between 1992 and 2010 and prior to ANS' Comprehensive Land Claim in 2013, we were not a signatory to the claim and that there are "three active court cases."[17] It also notes that ABL has our own elected Council comprised of a Chief and six Councillors, acknowledging that CNL is aware that we have our own, independent governance regime separate from ANS.[18] The IER makes no further reference to ABL specifically and only refers to ANS with respect to its attempted consultation. The CNSC and CNL's Commission Membership Documents (CMDs) each only refer to ABL once in stating that we are encompassed within the ANS tribal council.[19][20]

As we were never engaged directly, ABL has never had a chance to review any of the documents relied upon at this hearing and on which the CNSC will ultimately make its determination on whether to approve CNL's application and amend its CRL Site license to authorize the construction of the NSDF. ABL has not had an opportunity to review these documents with our community and provide our comments on the structure of the environmental assessment, the risks outlined or the mitigation measures proposed prior to official submission to the CNSC. To this day, we do not have a comprehensive sense of our community's position on any of these issues which is essential in order to determine ABL's concerns, express them and have them responded to. We would also have appreciated an adaptation of the means and logistics of this hearing engagement to create conditions in which our members can fully express themselves in our language.

We were also never asked the question: "How would you prefer to be engaged?" Had we been contacted directly, we would have expected the CNSC to work with us to create work plans and

[17] Canadian Nuclear Laboratories, Indigenous Engagement Report for the Near Surface Disposal Facility Project, Revision 6, January 17, 2022 at p 69.

[18] Canadian Nuclear Laboratories, Indigenous Engagement Report for the Near Surface Disposal Facility Project, Revision 6, January 17, 2022 at p 69.

[19] 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 126.

[20] Canadian Nuclear Laboratories, Commission Member Document for Licensing Decision, "Chalk River Laboratories Site LIcence Amendment to Authorize the Construction of the near Surface Disposal Facility", January 24, 2022 at p 47.

execute agreements in line with our preferred means of engagement and to provide funding in support of our engagement in the planning and environmental assessment processes.

Throughout this engagement, we would expect the CNSC to consult with our community on values of importance, potential effects and impacts related to changes in health, social, economic, and environmental conditions due to the Project. We would expect the CNSC to seek direction from our community concerning:

- cultural practices to be followed;
- expectations for time allotted for review, dialogue, and collaboration;
- language or format of information shared;
- how Mitchikanibikok Inik wishes to be kept informed;
- Elder and Anishinaabegmowin working committees to be formed;
- specific studies that Mitchikanibikok Inik may lead or participate in;
- how various communities choose to work together in relation to the IA process; and
- how Indigenous knowledge will be used and protected.

Instead, we received no direct engagement at all. The CNSC and CNL assumed that ANS represented our interests, communicated with the Secretariat and took its "unresponsiveness" as an indication that ABL was not interested in engaging.

Both the CNSC staff and CNL set out these nonsensical attempts at "engagement" in their CMDS and in the CNL's EIS. It should be noted that the CNSC staff's CMD acknowledges that ANS, and consequently ABL, may have an interest in and/or could potentially be impacted by the NSDF project.[21]

In its EIS, the CNL claims to have provided ANS with 6 letters, 8 phone/email correspondences and 16 general emails regarding the NSDF project. CNL's CMD further claims that ANS has not provided a response to any of CNL's attempts to engage with them. It should also be noted that in or around 2018 ABL was not convening regularly with the ANS. Had CNL or the CNSC made real attempts to engage with a back and forth with the ANS, they would have been aware of this as opposed to continuously sending boilerplate correspondence when the ANS was not in a position to receive or consider it at this time.

Again, none of these "attempts" were made with ABL directly, and we are not in a position to comment on the CNSC and CNL's claimed attempts of engagement with ANS or ANS' alleged lack of response.

Despite this, we eventually became aware of our need to get involved in this process through discussions with Kebaowek First Nation. Algonquin First Nation communities have communicated with each other on issues of importance on our territory since time immemorial, family to family, band to band. Once we became aware that Kebaowek was becoming involved, despite the CNSC's failure to engage them as well, we took action to support Kebaowek and our

[21] 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 99.

own position. On March 4, 2022 we got in contact with the CNSC to discuss a participant funding agreement for our engagement with the NSDF project assessments. Then on April 4, 2022 we signed an agreement with CNSC. This gave us little to no time to undertake all the tasks outlined in the agreement and to rely on the information obtained from them to provide comprehensive submissions.

Accordingly, ABL submitted a request for ruling to the CNSC on April 1, 2022, in accordance with rule 20 of the *Canadian Nuclear Safety Rules of Procedure* in favour of an adjournment of this public hearing for a period of 12 months.[22] We made this request on the basis that we are extremely concerned about the NSDF project's and its potential impacts and considering our community's deep-seated ecological and environmental knowledge, acquired through a long and intimate association with the Kitchi-Sibi, as we know the Ottawa River, and surrounding sites are not reflected in the baseline studies conducted by CNL. We also took issue with the aggressive timeline that has led to the negotiation of participant funding agreements being undertaken in an informational vacuum. Despite this, the Commission determined that an adjournment was not merited and that it would be premature to adjourn the proceedings at this time as the upcoming public hearing forum would provide an "opportunity to review and assess, in a fair and transparent manner, all of the evidence respecting the consultation and engagement activities undertaken respecting the NSDF project."[23] The decision further states that an adjournment "is unnecessary in order to protect claimed or established Aboriginal and/or treaty rights" as the issue would be dealt with at the hearing.[24]

ABL submitted our preliminary written submissions on April 11, 2022. Following this, the CNSC Commission Registry provided us with an extension to file our substantial submissions, contained herein, to April 28, 2022. We were also granted an extension to May 17, 2022 to submit our report on community engagement activities and PowerPoint presentation for our oral submissions. More recently, our community faced an influenza and COVID-19 outbreak. We reached out to the CNSC Commission Registry for a further extension, which was granted to May 4, 2022.

Ultimately, the procedure to date is ineffectual and ignores the necessity of our participation entirely, unduly limiting us through arbitrary timing constraints that leave us no time to determine and present as to how the NSDF project will impact our rights. We are a jurisdiction. We want to cooperate but we need time and resources in order to act accordingly. The CNSC cannot bypass our right to do so by forcing us into its ready-made engagement processes in order to check off boxes and be satisfied that it "engaged" us and fulfilled its DTCA.

<u>CNSC's Duty to Consult and Accommodate ABL has Not Been Fulfilled</u>

The Crown's, and in this case the CNSC's, DTCA owed to ABL applies and is triggered by the CNSC's decisions under the CEAA and NSCA. In light of ABL's rights that flow from its title and the serious potential impact the NSDF project may have on them, the duty owed here falls on

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[22] SOR/2000-211.

[23] Canadian Nuclear Safety Commission, Record of Decision in the Matter of "Request for Ruling FIled by the Mitchikanibikok Inik (Algonquins of Barriere Lake) in the Matter of the Application from the CNl to amend its Chalk River Laboratories site license to authorize the construction of a near surface disposal facility," April 7, 2022 at p 1.

[24] Canadian Nuclear Safety Commission, Record of Decision in the Matter of "Request for Ruling Filed by the Mitchikanibikok Inik (Algonquins of Barriere Lake) in the Matter of the Application from the CNl to amend its

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."[25] 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."[26] There is no dispute about whether or not the CNSC is responsible for the DTCA in this case. The CNSC has expressly acknowledged that it owes a DTCA to First Nations affected by the NSDF project, including ABL.[27]

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.[28] The CNSC, has again, explicitly recognized that the duty is triggered here. The CNSC's Commission Member Document 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."[29] Importantly, ABL is included, via ANS, in the CNSC staff's list of Indigenous Groups who may have an interest in and/or could potentially be impacted by the NSDF project.[30]

The Duty Falls on the High End of the Spectrum

The scope of the DTCA lies on a spectrum.[31] 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.[32] 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.[33] Conversely, if the duty falls on the high end of the spectrum, deep consultation is required.[34]

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[25] *Nuclear Safety and Control Act*, s 8(2).

[26] *Peter Ballantyne Cree Nation v Canada*, 2016 SKCA 124 at para 61.

[27] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 126.

[28] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.

[29] 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.

[30] 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 99.

[31] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

[32] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 43-44.

[33] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 43.

[34] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 43.

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."[35]

Here, the CNSC's duty falls on the high end of the spectrum and requires deep consultation. ABL has evidenced our strong prima facie case for our Aboriginal rights. Further, these rights are wide in scope covering all 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. ABL 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.[36] Our rights including our rights to harvest, gather and use the land stem from the fact that we have been on the land since time immemorial. Our exercise of these rights 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 ABL'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.[37] 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:

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[35] *Coldwater First nation v Canada (Attorney General)*, 2020 FCA 34 at para 41.

[36] *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 Coté*, [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.

[37] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 47.

- "Change to air quality due to an increase in emissions, including dust and greenhouse gasses (GHGs), associated with construction and operations activities";[38]
- "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";[39]
- "Changes to downstream discharge patterns";[40]
- "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;[41]
- "Changes to habitat quality and function from NSDF Project activities during construction and operations phases";[42]
- "Changes to groundwater flow";[43]
- "Changes to groundwater quality";[44]
- "Fish habitat loss and alteration";[45]
- "Changes to fish health" including those to the four species of fish with conservation concern;[46]
- "Habitat loss and alteration for migratory birds" including those in the local study area that have been identified as species at risk;[47]
- "Sensory disturbance of migratory birds throughout the construction, operation and closure phases" again including the identified species at risk;[48]
- Human "exposure to air and water non-radiological contaminants by inhalation and ingestion";[49]

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[38] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 49.

[39] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 53.

[40] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 53.

[41] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 63.

[42] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 63-64.

[43] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 70.

[44] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 70.

[45] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 75.

[46] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 75, 76.

[47] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 81-82.

[48] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 81-82.

[49] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 90.

- Human "external and internal exposures to radiological contaminants";[50]
- Greenhouse gas emissions from decomposition of the waste on the site;[51]
- Impacts on species at risk including bats, Blanding's turtle, eastern milksnake and monarch butterfly;[52]
- Impacts from potential accidents and malfunctions; and[53]
- Cumulative environmental effects.[54]

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.[55] 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 ABL's input and engagement with this process. The Commission simply does not have any of the information it needs to make these determinations. Both ABL's 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.[56] This dialogue is essential in order for any accommodation provided by the crown to have a nexus with the First Nation concern.[57] "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. [58] None of the "consultation" steps taken by the CNSC, and directed towards the wrong body, have facilitated this. It must be emphasized that CNSC's inquiry under the DTCA is not into environmental impact or the safety of a proposed

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[50] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 90.

[51] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 96-97.

[52] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 100-107.

[53] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 107-112.

[54] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 120.

[55] Transcript of February 22, 2022 Part 1 of CNSC Public Hearing at p 23-24.

[56] *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para 63.

[57] *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at paras 71-79.

[58] T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49 at p 61; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 49.

project, "it inquires into the impact on the *right*."[59] The CNSC is not in a position to consider the impact of the NSDF project on ABL's rights without having even initiated 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 any potential impacts to ABL's rights.

We are not in a position to analyze the sufficiency of the CNSC's consultation efforts towards us as simply none were made. The CNSC made an erroneous assumption about who could properly represent ABL in these assessment processes and then acted on that assumption without ever asking us. It is unclear what gave the CNSC the impression that ANS was in a position to represent our interests, but the fact that it did not even take the care to discuss the issue with us speaks directly to CNSC's failure to engage ABL whatsoever in its assessment and decision making process regarding the proposed NSDF project. As a result of CNSC's complete lack of engagement with us, we have had no real opportunity to even consider if and how we would want to be involved.First, ABL 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 dumping, but none of these documents can be said to have properly addressed impacts to ABL's rights without having considered our actual input on this topic.[60] All of the assessments and conclusions made by the CNSC staff have been made without ABL's input and have been made unilaterally. Despite this, the CNSC staff still ask the Commission to make their determinations based off of this inadequate information. CNSC staff are unable to properly identify ABL's rights let alone come to any conclusions on potential impacts to them.

While CNSC staff are satisfied with their analysis, ABL has not had any opportunity to study or consider the project's potential impacts on its harvesting or any other rights. ABL has not completed a land use, occupancy study, traditional knowledge study or cumulative effects study on the affected area and this assessment was done absent any information of ABL's land use.

The CNSC staff also deemed mitigation measures to be sufficient to address the project's environmental impacts without ABL's input. ABL 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"[61] 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 in order to reasonably conclude that the statutory requirements and the DTCA are made out.

<u>Conditions under CEAA cannot be met</u>

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[59] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 45.

[60] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 49.

[61] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 71.

Just as the CNSC's DTCA to ABL 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 complete lack of consultation with ABL.[62] 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.[63]

In all the ways that the CNSC did not fulfil its DTCA with ABL, 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 any information from ABL in order to make this assessment.

ABL Has Not Frustrated Consultation

There is a requirement regarding a First Nations' involvement in the DTCA, that "Indigenous groups '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."[64] The CNSC cannot take the position that procedural issues including what it may perceive as ABL's failure to proactively address assumptions about whether or not ANS represents our interests "frustrate" consultation and that, consequently, the Crown cannot be found responsible for the Duty 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 ABL in any way for the Crown's failure to fulfil its obligation. Further, the CNSC cannot blame ABL for failing to rectify the CNSC's unfounded assumptions about ANS' representation of ABL. It is not ABL's onus to direct the Crown about how to follow through

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[62] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.

[63] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 5(1)(c).

[64] *Coldwater* at para 195 citing *Haida* at para 42.

with its Constitutional obligations. The CNSC knew of ABL's interest in the NSDF project as it listed us as an affected First Nation in its EAR.[65]

The issues in communication between ABL 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."[66] By pushing forward by dealing with ANS instead of ABL directly, the CNSC failed to communicate or engage with us at all and yet still unilaterally determined these efforts to be sufficient.

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 owed to ABL, in fact it has not engaged with us at all 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 through the creation of an engagement framework that properly recognizes ABL as an equal jurisdiction in this matter. 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.

[65] Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 126.
[66] *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 159.