Federal Court  Cour fédérale

Date: 20250219

Docket: T-227-24

Citation: 2025 FC 319

Ottawa, Ontario, February 19, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

KEBAOWEK FIRST NATION

Applicant

and

CANADIAN NUCLEAR LABORATORIES

Respondent

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Overview

[1] This is an application for judicial review of a decision of the Canadian Nuclear Safety Commission ("Commission" when referring to the tribunal; "CNSC" when referring to the organization) dated January 8, 2024, granting Canadian Nuclear Laboratories Ltd.'s ("Canadian Nuclear" or "Respondent") application to amend their Nuclear Research and Test Establishment

Operating Licence (“Licence”) for the Chalk River Laboratories site (“Site”) to authorize the construction of a Near Surface Disposal Facility (“NSDF”) on the Site (“Decision”).

[2] The Applicant asks this Court to quash the Commission’s Decision because they argue that the Commission erred in law by declining to apply the *United Nations Declaration on the Rights of Indigenous Peoples*, OHCHR, 33rd Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295 (“Declaration” or “UNDRIP”) to its Decision or to apply it as a factor informing the discharge of the duty to consult and, if necessary, accommodate (“duty to consult and accommodate” or “DTCA”) with the Kebaowek First Nation (“Kebaowek” or “Applicant”).

[3] Kebaowek asserts that following the adoption of the UNDRIP into domestic law through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDA*], the Commission had an obligation to secure Kebaowek’s consent, pursuant to the UNDRIP, to construct the NSDF, and in order to fulfill its duty to consult and accommodate obligations, pursuant to section 35 of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c 11 (UK) [*Constitution Act, 1982*], the Crown must consult at a deep level, as informed by the UNDRIP and the *UNDA*.

[4] Kebaowek also asserts that the Commission failed to assess the effects of the NSDF on the environment and their section 35 Aboriginal and treaty rights (“section 35 rights”) because the Commission relied on a Forest Management Plan (“FMP”) that was not part of the record and had not been consulted on. Kebaowek argues that, effectively, this improperly delegated an assessment of the impacts of the NSDF to CNSC staff. In addition, the Applicant argues that the Commission failed to analyze the impacts of their permanent exclusion from the Site.

[5] Kebaowek asks this Court to quash the Commission's Decision and remit the matter back for further consultation and consideration by a newly constituted panel.

[6] The Respondent asserts that the Commission considered the application of the UNDRIP and the *UNDA* but determined that the content of the Crown's duty to consult and accommodate must be determined through an application of the legal framework developed in common law. The Commission found that it did not have the authority to determine how to implement the UNDRIP in Canadian law.

[7] The Respondent asserts that the record for this application demonstrates that the consultation process with Kebaowek was consistent with processes at the deepest end of the *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] spectrum (at para 62). The Respondent asserts that the NSDF will not adversely impact any asserted or established section 35 rights.

[8] The Respondent argues that consistent with Federal Court of Appeal jurisprudence, the Commission was entitled to approve the environmental assessment process ("EA Process") for the NSDF with future mitigation measures and mandatory conditions as set out in their FMP, and they argue that this was not an improper delegation of the Commission's authority.

[9] The Respondent argues that Kebaowek has not established that any aspect of the Commission's Decision was unreasonable or incorrect; accordingly, they request that the application be dismissed.

[10] This application, like many others, requires a consideration of the doctrine of reconciliation, which seeks to reconcile the pre-existence of Indigenous societies with the

imposition of Crown sovereignty. This application tests our commitment as Canadians to reconciliation and what is truly required to move towards achieving these objectives. This application also tests Canada's commitments to implement the principles set out in the UNDRIP, in particular the standard of "free, prior and informed consent" ("FPIC").

[11] For the reasons that follow, this application is granted in part. The Commission incorrectly determined that it had no jurisdiction to determine if the UNDRIP or the *UNDA* applied to the duty to consult and accommodate. As a result, the Commission erred in its assessment of the fulfillment of the duty to consult and accommodate.

A. *Terminology used in this judgment*

[12] A brief note on the terminology used in these reasons for judgment. The terms "Indian" and "Aboriginal" appear in the *Constitution Act, 1982* and in many other pieces of Canadian legislation, policy, jurisprudence, and reports that are relevant to the issues in this application. I acknowledge that the terms "Indigenous", "First Nation", "Métis", and "Inuit", as appropriate, have largely supplanted the use of these earlier terms. Where these reasons reference specific legislation, policy, jurisprudence, or a report, the terminology from those sources is used. I do not intend any disrespect by my use of such terminology.

[13] I also note that there are various spellings of "Anishinabeg" set out in the record and submissions of the parties. In these reasons, I have used the language and spelling most frequently set out in the parties' submissions for the purposes of consistency. Again, I do not intend any disrespect by my use of this term.

II. Background

A. *The parties*

[14] Kebaowek, also known previously as Eagle Village, is one of 11 recognised Algonquin Anishinabeg Nations that together comprise the broader Algonquin Nation. It is located on Lake Kipawa and is one of nine Algonquin communities in Quebec. Kebaowek is a member Nation of the Algonquin Anishinabeg Nation Tribal Council ("AANTC"). Kebaowek has approximately 1,100 members, of which roughly 500 live off-reserve in Ontario.

[15] Kebaowek's traditional territory includes lands within Ontario and Quebec, including the Site, which is located within the unceded traditional territory of the Algonquin Anishinabeg Nation. Kebaowek members exercise their section 35 rights and continue to practice customary Algonquin laws and governance, known as *Ona'ken'age'win*, within the territory. Lands and waters within this territory are part of the "Anishinable [*sic*] Aki." Kebaowek's reserve and asserted title territory are "northwest and upstream of the [Canadian Nuclear] Site."

[16] Canadian Nuclear holds the Licence for the Site and manages the operations of the Site pursuant to the terms of the Licence. The current Licence expires on March 31, 2028. This application concerns Canadian Nuclear's application to amend the Licence to develop the proposed NSDF. Currently, the Site houses a large nuclear facility that is the premier site for the development of medical isotopes in Canada.

[17] Atomic Energy of Canada Limited ("AEC" or "Atomic Energy") is a federal Crown corporation that contracts with Canadian Nuclear to manage its sites, nuclear activities, decommissioning programs, and waste management.

[18] Pursuant to the *Nuclear Safety and Control Act*, SC 1997, c 9 [*NSCA*], the CNSC is a federal tribunal that is mandated to regulate nuclear energy and the production, possession, and use of nuclear materials (section 8). In addition, the CNSC disseminates scientific, technical, and regulatory information concerning the activities of the CNSC and the effects of nuclear energy, substances, and equipment (*NSCA*, paragraph 9(b)). The *NSCA* sets out national standards, consistent with international standards, for the development, production, and use of nuclear energy (*NSCA*, Preamble). The *NSCA* strives to limit the risks to national security, health and safety of persons and the environment associated with the development, production and use of nuclear energy, and possession and use of nuclear substances and equipment (*NSCA*, paragraph 3(a)). The *NSCA* implements measures that Canada has agreed to concerning international control of the development, production, and use of nuclear energy, including nuclear weapons and explosive devices (*NSCA*, paragraph 3(b)).

[19] The CNSC is also a panel with the authority to carry out an environmental assessment, pursuant to section 15 of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA, 2012*]. It must decide whether a proposed nuclear project is likely to cause adverse environmental effects as defined in subsection 5(1) of the *CEAA, 2012*. The CNSC's environmental assessment decisions inform subsequent decision-making in the regulatory approvals process.

[20] The Decision applies only to Canadian Nuclear's application to amend the Licence to develop the NSDF and does not address future authorizations to operate the NSDF, nor does it address future operations at the Site generally; rather, operations will be the subject of future CNSC decisions.

B. *The Site*

[21] The Site contains both nuclear and non-nuclear facilities. It is located on approximately 3,870 hectares of land bordering the Kichi Sibi ("Ottawa River"). The site is located southeast of Deep River, Ontario, approximately 150 kilometers straight from Kebaowek's reserve lands, and outside of Kebaowek's claimed Aboriginal title area.

[22] Access to the Site has been restricted since the 1940s. It is controlled by security personnel and portions of the Site are fenced off to prevent outside intrusion. No hunting or fishing is permitted on the Site, nor is it accessible for other traditional uses by Indigenous Nations.

[23] Operations at the Site over the last 75 years have generated radioactive waste. AEC is responsible for the Site's waste, assets, and liabilities, as managed by Canadian Nuclear, through the decommissioning of non-operational nuclear facilities, the remediation of contaminated lands, and control of radioactive waste held in temporary storage ("Legacy Waste"). In addition, some waste from Canadian universities and hospitals is also stored on Site.

[24] The International Atomic Energy Agency has established global standards for the classification of radioactive waste, and Canada has adopted equivalent standards. The majority of the Legacy Waste that is currently at the Site is classified as low-level nuclear waste ("LLW"), as the materials have low amounts of long-lived radionuclides. LLW requires isolation and containment for periods of a few hundred years and may be safely handled with some precautions. In approximately 300 years, the radioactivity of the LLW will have decayed to "inconsequential levels."

[25] Canadian Nuclear is in the process of decommissioning obsolete facilities and buildings located on the Site. The waste materials that are currently stored at the Site are not stored in a manner that is consistent with modern international standards for the storage of hazardous nuclear materials. Ninety percent (90%) of the LLW and Legacy Waste planned for the proposed NSDF already exists or will originate from the Site. As such, proceeding with the proposed NSDF reduces the risks and costs associated with the transportation of nuclear waste for storage elsewhere.

C. *NSDF location and specifics*

[26] In March 2017, Canadian Nuclear applied to amend its Licence to develop the NSDF at the Site. The proposed facility will be a Class 1B Nuclear Facility as defined in by section 1 of the *Class I Nuclear Facilities Regulations*, SOR/2000-204, and the first permanent nuclear waste disposal facility in Canada. The proposed NSDF will include an engineered containment mound, a wastewater treatment plant, and support facilities and infrastructure. The NSDF will permanently store and dispose of up to one million cubic meters (1,000,000 m^3) of solid LLW, as well as Legacy Waste that has been generated at the Site over the last 75 years, including the clean-up of contaminated lands and waste stored in temporary storage facilities, waste generated at other AEC sites, and for future waste generated by the Site.

[27] The proposed NSDF is intended to enhance protection of the environment. The proposed location of the NSDF is 1,100 meters from the Kichi Sibi (“Ottawa River”), on a bedrock ridge sloping away from the river. The proposed NSDF will be 37 hectares, approximately 1% of the total Site area. The proposed NSDF will be secured within the Site with permanent fencing.

[28] The proposed NSDF will have a permanent impact on the Site. Once closed, the NSDF containment mound will resemble an 18-meter-tall grassy outcrop constructed into the existing hillside with a footprint of approximately 17 hectares. The containment mound will have a design life of 550 years. An institutional control period of 300 years will be implemented. This corresponds to 10 half-lives of short-lived radionuclides found in LLW; at the end of this period, the radioactivity level will have decayed to inconsequential levels.

D. *Consultation*

[29] In July 2016, Canadian Nuclear began to engage with Kebaowek and the AANTC. The AANTC was responsible for the coordination of consultation and other engagement sessions between Canadian Nuclear and its member nations, including Kebaowek.

(1) Consultation with AANTC

[30] Between July 2016 and November 2021, AANTC provided Canadian Nuclear with comments on multiple drafts of the Nuclear Waste Facility Environmental Impact Statement for the proposed NSDF. Canadian Nuclear sent letters and emails, held meetings, and hosted webinars on the proposed NSDF. AANTC participated in these events, as did representatives from Kebaowek.

(2) Consultation with Kebaowek

[31] Kebaowek was made aware of the proposed NSDF by CNSC staff in 2016 and were invited to participate in the EA Process. Kebaowek corresponded irregularly with CNSC staff between 2017 and 2020.

[32] On November 7, 2019, Kebaowek made a presentation at a CNSC public hearing on the Regulatory Oversight Reports on CNL Sites and requested the development of a Consultation Framework Agreement ("CFA").

[33] On May 14, 2020, Kebaowek wrote a joint letter with the AANTC to the Prime Minister's office expressing concerns with the EA Process for the proposed NSDF project. In a meeting with Canadian Nuclear on June 17, 2020, Kebaowek reiterated its request and insisted on the development of a CFA in advance of any further environmental assessment work with Kebaowek related to the proposed NSDF.

[34] On August 26, 2020, Kebaowek and the AANTC sent a letter to the Minister of Natural Resources, expressing their concerns about the CNSC's conduct and the NSDF consultation process. On May 31, 2021, Kebaowek and the AANTC wrote again to the Minister of Natural Resources and requested a moratorium on all projects before the CNSC for environmental assessment review, due to their alleged failure to consult and accommodate.

[35] On November 5, 2021, Kebaowek met with the CNSC Director of Indigenous and Stakeholder Relations Division ("Director") to discuss Kebaowek's previously communicated concerns and demands related to the CNSC processes. In an email on November 9, 2021, the Director summarized the discussions from November 5, 2021, and confirmed that the CNSC was of the view that participatory funding given to the AANTC was intended to help engage and coordinate among the Algonquin Nations, including Kebaowek.

[36] Representatives from Kebaowek attended the CNL Regulatory Oversight Overview Hearing on November 25, 2021, and raised concerns with the EA Process.

[37] On December 6, 2021, Kebaowek sent an email to the Director requesting funding to develop an action plan and CFA, separate from the AANTC. Later that day, Kebaowek received a response indicating that they were to work with AANTC to utilise funds remaining from those provided to AANTC.

[38] On December 7, 2021, the AANTC withdrew from its CFA with the CNSC and advised them that they could not be used to circumvent the CNSC's consultation obligations or as an excuse not to provide funding to specific member communities.

[39] On January 31, 2022, Kebaowek wrote to the CNSC requesting an adjournment of the hearing(s) scheduled for February 22, 2022, pending the development of a CFA and work plan with Kebaowek. This request was denied by the CNSC on February 18, 2022.

[40] Kebaowek's application for a participant CFA was accepted by the CNSC on March 18, 2022, and was finalised on April 4, 2022. The finalized CFA covered activities such as: a review of the Environmental Assessment Report ("EA Report") and supporting documentation; legal counsel review and analysis of the EA Report; development of plans and reports; and conducting community engagement activities.

[41] The Commission issued a procedural direction on July 5, 2022, that left the record open for a longer period of time to permit Kebaowek and Kitigan Zibi Anishinabeg ("KZA") to prepare further evidence for the Commission's consideration. Initially, Kebaowek and KZA were to provide their submissions by January 31, 2023, however, a further extension was granted to May 1, 2023.

III. Issues

[42] This application raises the following issues:

A. What is the appropriate standard of review?

B. Did the Commission err in determining that it did not have the jurisdiction to determine if the UNDRIP and *UNDA* applied to the duty to consult and accommodate?

C. Did the Commission err in determining that the Crown had fulfilled its duty to consult and accommodate Kebaowek?

D. Did the Commission err in determining that the NSDF is not likely to cause significant adverse environmental effects?

E. What is the appropriate remedy?

IV. Analysis

A. *Standard of Review*

[43] Generally, the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25).

[44] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, a reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[45] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

[46] That said, the Supreme Court of Canada ("Supreme Court") clarified that while reasonableness is the default standard of review, correctness review applies to constitutional questions and general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Vavilov* at para 58, citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 62).

(1) Issues B and C

[47] The Applicant submitted that the applicable standard of review for these two issues is correctness. They argued that both the jurisdictional question and the scope and content of the duty to consult and accommodate are constitutional questions, general questions of law of central importance to the legal system, and outside the Commission's area of expertise.

[48] Conversely, the Respondent argued that the Commission rooted its Decision in the legal parameters set out under the *CEAA, 2012* and the *NSCA*. They asserted that the Commission reasonably interpreted its enabling statute and respective jurisdiction, and that this interpretation is entitled to deference. They are of the view that these issues are not a constitutional matter nor a general question of law; in other words, the applicable standard of review for these questions is reasonableness.

[49] On an application for judicial review where this Court considers if the Commission has the jurisdiction to implement the UNDRIP, this Court ought to review the issue on a standard of correctness. The second situation that will rebut the presumption of reasonableness "is where the

rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies" (*Vavilov* at para 17; see also *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 62–64; *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

[50] Further, the Supreme Court clarified that questions concerning the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982* "require a final and determinate answer from the courts" (*Vavilov* at para 55, citing *Dunsmuir* at para 58 and *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322). Thus, these questions must be reviewed on a correctness standard.

[51] Even if I am wrong and the reasonableness standard were applied to the jurisdictional issue, the principles of statutory interpretation and the Supreme Court indicates that "administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them" (*R v Conway*, 2010 SCC 22 [*Conway*] at para 78; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at paras 39–44, 47, 117). Therefore, the Commission's Decision regarding its interpretation of its powers to consider the UNDRIP and *UNDA* is also unreasonable.

[52] Accordingly, I agree with the Applicant that the jurisdiction of the Commission and the scope and content of the DTCA are both constitutional questions and/or are general questions of

law of central importance and outside the Commission's area of expertise; therefore, these questions are reviewable on a standard of correctness.

(2) Issue D

[53] Both parties submitted that the applicable standard of review for this issue is reasonableness, and I agree.

B. *Did the Commission err in determining that it did not have the jurisdiction to determine if the UNDRIP and the UNDA applied to the duty to consult and accommodate?*

[54] The Commission noted that a number of Indigenous Nations, including Kebaowek, invoked the UNDRIP and the *UNDA* in the context of the analysis concerning the duty to consult and accommodate:

> … The Commission recognizes Canada's commitment to UNDRIP and the framework for reconciliation and implementation of UNDRIP set out within UNDA. However, while the jurisprudence on the legal effect of UNDA will surely develop over time, the Commission, as a creature of statute, is not empowered to determine how to implement UNDRIP in Canadian law and must be guided by the current law on the duty to consult.…
>
> [Decision at para 432.]

[55] The Applicant submits that the Commission erred in its failure to address the legal question concerning the applicability of the UNDRIP and the *UNDA* in its analysis of the Crown's fulfillment of the DTCA. The Applicant submits that this is an error of law because this conclusion is inconsistent with the Commission's statutory mandate, and it led to a result that is contrary to both the Commission's ability to apply the law and the incorporation of the UNDRIP into Canadian law.

[56] The Respondent argued that the Commission correctly and reasonably determined it did not have jurisdiction to consider the legal questions of the UNDRIP and the *UNDA*, and even if the Commission had the jurisdiction, the UNDRIP has not been implemented into Canadian law.

[57] For the reasons that follow, the Commission incorrectly determined that it did not have the jurisdiction to consider the UNDRIP and the *UNDA* and that they were not applicable to the DTCA analysis. I agree that the Commission's failure to address the applicability of the UNDRIP and the *UNDA* in its analysis of the fulfillment of the DTCA was an error of law.

(1) Duty to consult and accommodate—generally

[58] The duty to consult and accommodate is rooted in the honour of the Crown and is derived from section 35 of the *Constitution Act, 1982*, which recognizes and affirms section 35 rights. The DTCA must be satisfied before taking any action(s) that may affect section 35 rights. The duty is triggered when the Crown has either real or constructive knowledge "of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation* at para 35; see also *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 81).

[59] A wide range of government action may be considered "conduct" that can trigger the DTCA. The Supreme Court has noted that conduct or decisions that have "a potential for adverse impacts on pending Aboriginal claims or rights" qualify (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto Alcan*] at paras 44–45). This includes acts and decisions of regulatory agencies that act "on behalf of the Crown when making a final decision on a project application" (*Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] at para 29).

[60] However, it is important to understand that historical wrongs or grievances will not trigger “a fresh duty of consultation” (*Rio Tinto Alcan* at para 49; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas of the Thames*] at para 41). The potential adverse impact must be appreciable “on the First Nations’ ability to exercise their aboriginal right” to trigger the DTCA—mere speculative impacts are insufficient (*Rio Tinto Alcan* at para 46, citing *R v Douglas*, 2007 BCCA 265 at para 44).

[61] As will be discussed more fully below in the section 35 rights and limitations portion of these reasons, section 35 rights, including the constitutionally protected duty to consult and accommodate, may be infringed, subject to the framework set out in *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] at 1109. To be clear, and as will be explained below, the threshold for a justified infringement is very high.

[62] Finally, it must be noted that the DTCA is a right to a process, not a particular outcome. In assessing whether the duty has been fulfilled, “[t]he focus is on the process and whether reasonable efforts were made, and not on the substantive outcome” (*Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at para 34, citing *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paras 29, 53). It is important to note that this process does not give Indigenous Nations a veto power over proposals within their territories. Rather, “[t]he Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take” (*Haida Nation* at para 48).

[63] The Commission correctly “acknowledge[d] its obligation to fulfill the duty to consult and ensure that it considers impacts to Aboriginal and/or treaty rights, pursuant to section 35 of

the *Constitution Act, 1982* in the matter before it. The duty to consult must be satisfied before the Commission can make its decisions on the EA or the licence amendment" (Decision at para 430). However, the Commission erred in finding that it did not have the jurisdiction to consider the application of the UNDRIP and the *UNDA*; consequently, this skews their analysis of the DTCA and its fulfillment by the Crown.

(2) Jurisdiction of the Commission to determine legal questions

[64] The Applicant submitted that the Federal Court of Appeal has recognized that the CNSC has the authority under its governing legislation to determine questions of law, consistent with its role to assess the adequacy of consultation pursuant to section 35.

[65] For the reasons that follow, I agree.

[66] In *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 [*Paul*], the Supreme Court clarified that there is no requirement for an administrative tribunal to have an express ability to apply section 35, as there is no principled basis to distinguish questions arising under section 35 from other constitutional questions or *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] issues (*Paul* at para 38). In other words, section 35 rights are not an enclave that excludes administrative tribunals from determining these issues, and "it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim" (*Paul* at para 36).

[67] In *Conway*, the Supreme Court confirmed that the powers of the tribunal to consider remedial questions of law and the remedial powers granted to the tribunal by the legislature are relevant considerations in determining the scope of a tribunal's jurisdiction (at para 82). In determining a tribunal's power to interpret and apply section 35:

> … The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of [section 35] or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law….
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> [*Paul* at para 39; see also *Rio Tinto Alcan* at paras 69, 72; and *Clyde River* at para 36.]

Also in *Conway* at paragraph 6: "… The legacy of these cases — the *Cuddy Chicks* trilogy — is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates."

[68] Further, this Court has recognized that the Commission has the authority, pursuant to its governing legislation, to determine questions of law (*Athabasca Regional Government v Canada (Attorney General)*, 2010 FC 948 [*Athabasca*] at para 207, aff'd in 2012 FCA 73 at para 7). As noted by Justice Russell in *Athabasca*:

> [204] As the Respondents point out, subsection 8(2) of the Commission's empowering legislation states that the Commission is an agent of the Crown. Furthermore, subsection 20(1) of the [*NSCA*] states that the Commission is a court of record, and subsections 20(2) through 21(1) establish the extensive authority and power of the Commission to compel and collect evidence and to make and enforce decisions of a wide scope, including the implied authority to make decisions of law.

[69] In this application, the plain wording of subsection 20(1) of the *NSCA* is clear: "The Commission is a court of record." It is a well-established approach to statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) [Sullivan] at 7; *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*], section 10). There does not appear to be any limiting provisions with respect to the scope of the Commission's authority to consider legal questions. Similarly, paragraph 20(5)(a) of the *NSCA* confirms that the Commission has the authority to stay or dismiss an application for failure to comply with a term, condition of a licence, or an order pursuant to the *NSCA*; paragraph 44(6) allows the Commission to consider incorporating provincial laws when it makes regulations; and subparagraph 65.06(2) permits the Commission to consider the common law. These are all "legal" issues indicating that the Commission may consider issues of law.

[70] Therefore, in my view, the Commission is a body with authority to determine questions of law, including the interpretation of the fulfillment of the duty to consult and accommodate, which includes a consideration of the UNDRIP and the *UNDA*. The Commission's failure to grapple with this important question is an error of law. If the standard of reasonableness applies, the Decision is also unreasonable because it is inconsistent with the principles of statutory interpretation.

(3) Reference to the Federal Court

[71] Where tribunals are presented with legal or jurisdictional questions that go beyond the scope of their expertise, subsection 18.3(1) of the *Federal Courts Act*, RSC 1985, c F-7 permits tribunals to refer questions to the Court for determination:

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	**18.3 (1)** Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[72] In its Decision, the Commission stated that "as a creature of statute, [the Commission] is not empowered to determine how to implement UNDRIP in Canadian law." If the Commission was of the view that it did not have the jurisdiction to consider the application of the UNDRIP and the *UNDA*, it ought to have moved forward with a reference to the Federal Court for guidance on the interpretation of the legal question before it. As will be elaborated on later, this was essential to ensure that the Commission properly considered the factual and legal considerations in determining if the Crown had fulfilled its duty to consult and accommodate in the circumstances of this application.

[73] The Commission's failure to interpret its governing statutory authority and/or to seek guidance from the Federal Court is an error of law.

(4) The UNDRIP—an interpretive lens

[74] The UNDRIP is an international human rights instrument that sets out the collective and individual rights of Indigenous peoples and underscores the importance of self-determination.

The rights set out in the UNDRIP represent the "minimum standards for the survival, dignity and well-being of Indigenous peoples around the world" (*UNDA*, Preamble, at para 2). The UNDRIP emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures, and traditions, and promotes the pursuit of social and economic development aligned with the collective aspirations. The UNDRIP also advocates for the right of Indigenous people to full and effective participation in matters that concern them within states.

[75] The UNDRIP was adopted by the United Nations General Assembly on September 13, 2007. At the time, four states voted against its adoption: Australia, Canada, New Zealand, and the United States. In November 2010, following a change in position by New Zealand, Australia, and the United States, Canada conditionally endorsed the UNDRIP in a manner "fully consistent with Canada's Constitution and laws." In May 2016, Canada officially removed its conditional endorsement and announced that it is "now a full supporter of the [D]eclaration, without qualification" and that Canada would "adopt and implement the [D]eclaration in accordance with the Canadian Constitution." There were attempts to pass federal legislation to implement the UNDRIP between 2016 and 2021. The *UNDA* was officially passed and became apart of Canadian law on June 21, 2021.

[76] The UNDRIP may be relied on to interpret Canadian law (*Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 [*Reference*] at para 4; *R c Montour*, 2023 QCCS 4154 [*Montour*] at para 1287). The UNDRIP does not create new law or statutory obligations; rather, it is an interpretive lens to be applied to determine if the Crown has fulfilled its obligations prescribed at law. A review of the jurisprudence confirms that courts have not found that the UNDRIP created or is a source of Aboriginal or Treaty rights. However, the Supreme Court has indicated that the rights set out within the UNDRIP exist, suggesting that

the *UNDA* has codified pre-existing rights (*Reference* at para 17; see also Senwung Luk, "UNDRIP is now part of Canada's "domestic positive law". What does this mean?" (April 4, 2024), online: <https://www.oktlaw.com/undrip-is-now-part-of-canadas-domestic-positive-law-what-does-this-mean/>).

[77] Importantly, the Supreme Court has clarified that the UNDRIP is the foundational framework for the "reconciliation initiative by Parliament" (*Reference* at para 3). The *UNDA* is the legislative measure that provides a framework for the implementation of the UNDRIP (*Reference* at para 4). However, the Supreme Court was clear that like the UNDRIP, the *UNDA* is not a source of rights, "but rather proceeds on the premise that these rights exist" (*Reference* at para 17).

[78] Recently, the Supreme Court found that "[w]hile the Declaration is not binding as a treaty in Canada… the Declaration has been incorporated into the country's positive law by the [*UNDA*]" (*Reference* at para 4; see also *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*] at para 317, per Martin J. and O'Bonsawin J., dissenting). Parliament's enactment of the *UNDA* in 2021 "[affirmed] the Declaration 'as a universal human rights instrument with application in Canada law'. It is therefore through this Act of Parliament that the Declaration is incorporated into the country's domestic positive law" (*Reference* at para 15). Finally, I note that Parliament clarified that "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian Law" (*UNDA*, subsection 2(3)).

[79] While the Respondent is correct that Canada "must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" (*UNDA*, section 5); that the Minister must prepare and implement an

action plan (*UNDA*, section 6); and prepare an annual report on the progress of the same (*UNDA*, section 7), it is clear that neither the necessary measures and work to ensure consistency of laws nor the development of an action plan are intended to delay the implementation of the UNDRIP into Canadian law (*UNDA*, subsection 2(3)).

[80] To summarize, the UNDRIP was incorporated into Canada's positive legal framework on June 21, 2021, through the *UNDA*. Accordingly, the UNDRIP may be used to interpret Canadian law and legal obligations. This is consistent with some recent observations of the Supreme Court in the context of the interpretation of section 25 of the *Charter*:

> … [section] 25 was intended to operate as an interpretive prism based on its nature, purpose, and history. This approach is most consistent with the way in which competing rights under the *Charter* are balanced and best reflects the needs of all Indigenous people, the final recommendations of the Royal Commission, and the rights enshrined in *UNDRIP*. It provides a respectful and responsive path forward into a future in which *Charter* rights and Indigenous conceptions of rights will be integrated in a variety of legal fora.
>
> [*Dickson* at para 289.]

[81] In my view, interpreting section 35 rights in a manner consistent with the UNDRIP aligns with the objectives articulated in the preambular provisions of the *UNDA*. Specifically, the importance of the UNDRIP as a framework for reconciliation is consistent with the Truth and Reconciliation Commission of Canada Calls to Action and the National Inquiry into Missing and Murdered Indigenous Women and Girls Calls for Justice—that all relationships with Indigenous peoples must be based on recognition and implementation of the inherent right of self-government; and that the UNDRIP is a source for the interpretation of Canadian law. Further and pertinent to this judicial review application, the *UNDA*'s Preamble highlights that the UNDRIP "can contribute to supporting sustainable development and responding to growing concerns

relating to climate change and its impacts on Indigenous peoples." Accordingly, this requires all decision makers, including administrative tribunals that have the authority to determine questions of law such as the Commission, to actively consider how the UNDRIP may impact the interpretation of Canadian laws, including the fulfillment of section 35 constitutional obligations.

[82] The Applicant noted that several tribunals have considered the application of the UNDRIP following the enactment of the *UNDA* (*Commission of the Canada Energy Regulator Report in the Matter of NorthRiver Midstream NEBC Connector GP Inc*, Application date 18 November 2021 for the NEBC Connector project, issued 18 October 2023, 2023 CanLII 96327 (CA CER); *Trans Mountain Pipeline ULC Trans Mountain Expansion Project Certificate of Public Convenience and Necessity OC-065,* Application pursuant to section 211 of the *Canadian Energy Regulator Act* Segment 5.3 – Pípsell (Jacko Lake), issued 20 October 2023, 2023 CanLII 103751 (CA CER)). I am persuaded that the jurisprudence supports the conclusion that the UNDRIP is clearly an interpretive lens to be applied in the analysis of section 35 rights.

[83] Finally, a review of the legislative framework for the Commission underscores that the advancement of the presumption of conformity is a paramount consideration both for the purposes of the *NSCA* and objectives of the Commission (see also *Montour* at para 1175 and *Dickson* at para 317; *Athabasca* at para 194). Paragraph 3(b) and subparagraph 9(a)(iii) of the *NSCA* state:

Purpose	**Objet**
3 The purpose of this Act is to provide for	**3** La présente loi a pour objet :
…	[…]
(b) the implementation in Canada of measures to which	**b)** la mise en œuvre au Canada des mesures de

Canada has agreed respecting international control of the development, production and use of nuclear energy, including the non-proliferation of nuclear weapons and nuclear explosive devices.	contrôle international du développement, de la production et de l'utilisation de l'énergie nucléaire que le Canada s'est engagé à respecter, notamment celles qui portent sur la non-prolifération des armes nucléaires et engins explosifs nucléaires.
…	[…]
Objects	**Mission**
9 The objects of the Commission are	**9** La Commission a pour mission :
(a) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to	**a)** de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :
…	[…]
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed…	**(iii)** ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;

[84] The Supreme Court has confirmed the application of the presumption of conformity in Canada law, as "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law" (*R v Hape*, 2007 SCC 26 at para 53). Recently, the Quebec Court of Appeal noted that "[t]here is no reason for not extending this presumption to [section] 35 of the *Constitution Act, 1982*, given that it pertains primarily to the protection of the

fundamental rights of Aboriginal peoples" (*Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 509; *Mason* at para 106).

[85] In other words, it is presumed that the interpretation of section 35 of the *Constitution Act, 1982* will be done in a manner that conforms to international agreements that Canada is a part of, including the UNDRIP.

[86] The Commission's Decision that it did not have the jurisdiction to determine and apply the UNDRIP is an error of law and is misaligned with the presumption of conformity.

C. *Did the Commission err in determining that the Crown had fulfilled its duty to consult and accommodate Kebaowek?*

[87] The Commission, as an agent of the Crown, was satisfied that it had upheld the honour of the Crown and had fulfilled its common law duty to consult and accommodate the Indigenous interest(s), pursuant to section 35 of the *Constitution Act, 1982* (Decision at para 25).

[88] Kebaowek argued that the UNDRIP had to be considered to assess the scope and content of the consultation required, pursuant to the DTCA. The Commission's failure to do so is an error of law.

[89] The Respondent argued that the *UNDA* does not alter the Crown's duty to consult and accommodate or the obligations of the Commission, absent further steps. In any event, they argued that the Decision is reasonable and this Court ought to accord deference to the Commission's finding on the fulfillment of the DTCA.

(1) UNDRIP Articles

[90] Kebaowek submitted that the Commission ought to have considered several articles of the UNDRIP ("Articles") in its consideration of the fulfillment of the duty to consult and accommodate. In particular, Kebaowek highlighted the following Articles:

> ***Article 11***
>
> 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.
>
> ***Article 12***
>
> 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.
>
> ***Article 13***
>
> 1. Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

> 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate measures.
>
> …
>
> ***Article 25***
>
> 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.
>
> …
>
> ***Article 29***
>
> …
>
> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior, and informed consent.
>
> …
>
> ***Article 32***
>
> …
>
> 2. States shall consult and cooperate in good faith 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.

[91] Kebaowek argued that these Articles underscore the distinctive relationship that they have with their land and water, the importance of the deep spiritual and cultural connections they have with the land and water, and the need to maintain those connections.

(2) Interpretation principles

[92] There is no Canadian jurisprudence that considers how these Articles should be interpreted or how they may aid in the interpretation of Canadian laws. Accordingly, I acknowledge the importance that these reasons will have going forward as one of the first decisions that set out how the UNDRIP, as incorporated into federal law through the *UNDA*, may be utilized as an interpretive aid. I have no doubt there will be further opportunities for all levels of court to consider these issues, and the jurisprudence will develop and evolve over time.

[93] Alongside the release of its final report in December 2015, the Truth and Reconciliation Commission of Canada released 94 Calls to Action ("CTA") "to redress the legacy of residential schools and advance the process of Canadian reconciliation" (Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015)). The first two CTAs under the "Reconciliation" section are directed towards the Canadian government and implementation of the UNDRIP:

> 43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
>
> 44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.

[94] Similarly, in 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls released its Calls for Justice ("CFJ") (National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* (Ottawa: Privy Council Office, 2019)), with the

intention to animate the pathways to end the genocide against Indigenous women, girls, and 2SLGBTQQIA people described in their concluding report *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. The second-listed CFJ is directed towards implementation of the UNDRIP:

> 1.2 We call upon all governments, with the full participation of Indigenous women, girls, and 2SLGBTQQIA people, to immediately implement and fully comply with all relevant rights instruments, including but not limited to:
>
> …
>
> v. UNDRIP, including recognition, protection, and support of Indigenous self-governance and self-determination, as defined by UNDRIP and by Indigenous Peoples, including that these rights are guaranteed equally to women and men, as rights protected under section 35 of the Constitution. This requires respecting and making space for Indigenous self-determination and self-governance, and the free, prior, and informed consent of Indigenous Peoples to all decision-making processes that affect them, eliminating gender discrimination in the *Indian Act*, and amending the Constitution to bring it into conformity with UNDRIP.

[95] Together, these reports and recommendations stress the importance of looking to the UNDRIP as a "framework for reconciliation" (CTA 43) and underscore the importance of "free, prior, and informed consent of Indigenous peoples to all decision-making processes that effect them" (CFJ 1.2(v)).

[96] That said, the standard of FPIC as articulated in the UNDRIP has been particularly controversial in Canada. There has been much confusion about the meaning of FPIC, with the majority of dialogue focused on the wording of FPIC and concerns that this amounts to a "veto" or absolute power for Indigenous peoples. The FPIC standard is tied to Indigenous peoples' right of self-determination and international human rights jurisprudence on property, cultural, and

non-discriminatory rights (see for example Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Int'l Hum Rs 54 at 56 [Ward]). Former United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya described FPIC as being an aspect of self-determination (James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996) at 81). Mr. Anaya is clear that FPIC "should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples" (*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UNHRC, 2009, 12th Sess, UN Doc A/HRC/12/34 at para 46). The UNDRIP is an important tool to "ensure that Indigenous peoples meaningfully participate in decisions directly impacting their lands, territories and resources," rather than as a veto (Ward, at 56).

[97] The fact that FPIC is not a veto or absolute power and is subject to the same limitations as other Articles is reinforced by Article 46:

> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

[98] International conventions generally require domestic legislation before they may take on the force of law, as implementation legislation is how these conventions are brought into the domestic legal framework (J Maurice Abour, *Droit International Public*, 4th ed (Cownansville, QC: Yvon Blais, 2002) [Maurice] at 162). Parliament employs various techniques to implement international conventions and obligations into the domestic legal framework (Sullivan, at 559–584). Once Parliament has implemented the international obligations and/or conventions, these may be interpreted by domestic courts and tribunals, like any other law (Sullivan, at 561).

[99] As noted above, Canada has incorporated the UNDRIP into the Canadian legal framework through the *UNDA*. Subsection 2(3) of the *UNDA* is clear that "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law."

[100] The Respondent points to the *UNDA*, noting that its purpose is to "provide a framework for the Government of Canada's implementation of the Declaration" (paragraph 4(b)), and that the Government is to work with Indigenous peoples to develop an action plan "to achieve the objectives of the Declaration" (section 6). The Respondent notes that the *United Nations Declaration on the Rights of Indigenous Peoples Act* Action Plan ("Action Plan") was released in 2023, and while the Action Plan notes that Canada will work in consultation with Indigenous communities to enhance participation in regulatory process, there is no specific reference made to the CNSC, nor amendments to the applicable legislative framework to address implementation of the UNDRIP. Accordingly, the Respondent is of the view that the *UNDA* has not fully implemented the UNDRIP into Canadian law.

[101] Further, the Respondent points to *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [*Gitxaala*], a recent Supreme Court of British Columbia ("BCSC") decision that considered British Columbia's *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]. In *Gitxaala*, Justice Ross found that the UNDRIP had not been implemented into provincial law and that the *DRIPA* did not impose a justiciable obligation on the province to ensure that its laws conformed with the UNDRIP (at para 490).

[102] With respect, I am not persuaded by this decision and in my view, it is distinguishable. The Court in *Gitxaala* considered if the provincial mineral tenure system was inconsistent with the UNDRIP and the *DRIPA*. In this application, the issue is not conformity of laws, as these will be the subject of the mutually-developed Action Plan (*UNDA*, section 6). Rather, the present issue is if the UNDRIP is a part of the laws of Canada such that it may be used to interpret the scope of the duty to consult and accommodate.

[103] There are two approaches that inform how international conventions that have been incorporated into Canadian law are to be interpreted.

[104] The first approach is grounded in the principle of complementarity. Pursuant to section 8.1 of the *Interpretation Act*, the international convention ought to be interpreted in accordance with the domestic law, including the applicable private law of the province. This approach promotes interpretation of the UNDRIP in a manner that respects the principle of complementarity with provincial law.

[105] The second approach takes into account the context of the international convention (Maurice, at 184–186). Generally, legislation is presumed to comply with Canada's international obligations (Sullivan, at 560–561).

[106] As noted above, the well-established approach to statutory interpretation considers the words of the legislation and interprets those words in keeping with their ordinary and grammatical meaning. This approach aligns with principles of interpretation for international treaties, as set out in the *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 [*Vienna Convention*]. In particular, Articles 31 and 32 of the *Vienna Convention* underscore the importance of interpreting treaties in good faith and in accordance with the ordinary meaning of the terms used in the treaty. A purposive approach ought to be applied, and should consider the text, preambular provisions, and annexes of the treaty. Where there is ambiguity, supplementary sources, including preparatory work, may be considered.

[107] Finally, it is worth considering how FPIC has been addressed in the Inter-American Court of Human Rights ("IACHR") and in international domestic courts (Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples" (2017) 7:1 UWO J Leg Stud 4 [Boutilier]). The IACHR recognised the importance of FPIC in *Case of the Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172 [*Saramaka People*]. In *Saramaka People*, the IACHR noted that to ensure effective participation of the Saramaka people in the development of their territory, "the State has a duty to actively consult with said community according to their customs and traditions" (*Saramaka People* at para 133). Moreover, the IACHR noted that the consultation must use "culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramaka people must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community" (*Saramaka People* at para 133). The IACHR encouraged prompt, full, and frank communications to ensure all parties had time to consider the

environmental and health impacts and risks, in order that the plan is accepted "knowingly and voluntarily," and stated that the process takes into account the Saramaka people's "traditional methods of decision-making" (*Saramaka People* at para 133).

[108] The IACHR went on to hold that for "large-scale development or investment projects that would have a major impact in Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions" (*Saramaka People* at para 134). To elaborate its reasoning why consent is required, the IACHR noted the observations on the situation of human rights and indigenous peoples by the UN Special Rapporteur:

> [w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.… The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.
>
> [*Saramaka People* at para 135, citing the *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, UNCHR, 59th sess, UN Doc E/CN 4/2003/90, January 21, 2003, at 2.]

[109] In other words, FPIC is essential for the protection of Indigenous peoples' human rights in the face of major development projects, and the IACHR suggests that in some circumstances, FPIC may be a requirement (*Saramaka People* at para 136).

[110] In *Case of the Kaliña and Lokono Peoples v Suriname* (2015), Inter-Am Ct HR (Ser C) No 309 [*Kaliña and Lokono Peoples*], the IACHR commented on the interpretation of Article 21 of the American Convention on Human Rights, and noted that pursuant to Article 29 of the UNDRIP, Indigenous peoples "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination" (*Kaliña and Lokono Peoples* at para 180). The IACHR noted that other Articles underscore "the right to maintain and strengthen their distinctive spiritual relationship with their traditionally-owned or otherwise occupied and used lands… and other resources and to uphold their responsibilities to future generations" (Article 25) and "the right to participate in decision-making in matters which would affect their rights, through representatives" (Article 18) (*Kaliña and Lokono Peoples* at para 180). Accordingly, the IACHR found that "in principle, the protection of natural areas and the right of the indigenous and tribal peoples to the protection of the natural resources in their territories are compatible, and … owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation" (*Kaliña and Lokono Peoples* at para 181). The IACHR then established "the criteria of a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation" as requirements that States have the "adequate mechanisms to implement" to guarantee the rights of Indigenous peoples "in relation to the protection of natural resources that are in their traditional territories" (*Kaliña and Lokono Peoples* at para 181).

[111] The IACHR's *Saramaka People* and *Kaliña and Lokono Peoples* decisions highlight the importance of consultation with Indigenous peoples in a manner that respects their processes and

with the objective of reaching an agreement. This responsibility upon States recognises Indigenous peoples' interrelationships with their traditional lands and territories; the fact that impacts of major projects are often deeply borne by Indigenous communities; and that Indigenous peoples have generational knowledge to share with respect to conservation and protection of natural areas. The IACHR speculates in these decisions that there are certain circumstances where the consent of Indigenous peoples is required, particularly for large scale development projects.

(3) Contrast between the duty to consult and accommodate, and free, prior and informed consent

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

[113] The second important distinction between FPIC and the DTCA is with respect to the limitations on the right in question.

(a) *Section 35 rights—limitations*

[114] Section 35 rights are not absolute and may be infringed, subject to the framework established in *Sparrow*. In *Sparrow*, the Supreme Court identified a two-step test that the Crown must satisfy in order to justify the infringement of a section 35 right. A review of the jurisprudence suggests that the threshold for justified infringement is very high (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] at para 165; *Yahey v British Columbia*,

2021 BCSC 1287 at paras 516–521) and the test is highly contextual; in other words, the standard of justification varies with the facts of each case (*Sparrow* at 1110–1111):

1. The section 35 right(s) holding collective must establish that there is an interference with an existing section 35 right. The Court asked a number of questions to understand the characteristics and scope of the right at stake and how the right has been infringed. Considerations include if the "purpose or effect" of the impugned law or activity "unnecessarily infringes" the collective's ability to exercise a particular section 35 right. If so, then the Court will find a *prima facie* infringement of that right and the Crown bears the burden of justifying the infringement (*Sparrow* at 1112).
2. In order to justify the infringement, the Crown must demonstrate that:
    a. There is a valid legislative objective that is "compelling and substantial;" examples provided by the Supreme Court include conservation and natural resource management, and public safety. However, the Supreme Court was clear that "public interest" is not sufficient to justify the limiting of a constitutionally protected right (*Sparrow* at 1113); and
    b. The limitation is justified in light of the principle of the honour of the Crown and the Crown's fiduciary duty towards Indigenous people (*Sparrow* at 1114–1121). Here the Court will consider if the infringement is necessary to achieve the Crown's purpose, if the infringement minimally impairs the protected right, if fair compensation was offered, and if there was consultation with the rights holding collective (*Sparrow* at 1114–1121).

[115] The development of natural resources is not meant to ride roughshod over section 35 rights while concurrent settlement processes and discussions occur with rights holders

concerning the nature and scope of their rights. It is for this reason that the Supreme Court established the doctrine of the duty to consult and accommodate. The Supreme Court noted that the nature of the DTCA is contextual, and what will be required varies with the circumstances:

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding".
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential for infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as

> to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> [*Haida Nation* at paras 43–45, citations omitted.]

[116] The scope of the Crown's obligations is directly proportional to the nature and seriousness of the infringement of the section 35 right. In *Delgamuukw*, the Supreme Court suggested that in some circumstances, "full consent of an aboriginal nation" may be required (*Delgamuukw* at para 168). This was confirmed in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*], where the Supreme Court noted that:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.
>
> …
>
> … The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.
>
> Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial government objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.
>
> [*Tsilhqot'in Nation* at paras 76, 79–80.]

[117] Additionally, the Supreme Court in *Tsilhqot'in Nation* reaffirmed the test for a justified infringement of section 35 rights. To justify an infringement of a section 35 right, the Crown

must demonstrate: "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group" (*Tsilhqot'in Nation* at para 77). The Supreme Court then examined the Crown's fiduciary duty and noted it "infuses an obligation of proportionality into the justification process" (*Tsilhqot'in Nation* at para 87). Implicit in this obligation and the Crown's fiduciary duty is the requirements that there be a "rational connection" between the infringement and the proposed objective; that the infringement of rights is as minimal as possible; and that the infringement of the rights is proportional to the perceived benefit (*Tsilhqot'in Nation* at para 87).

[118] Article 46(2) is clear that "[t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations." The justification for the limitation of UNDRIP rights appears to be more stringent, as Article 46(2) states that any limitation on a right must be:

1. In accordance with international human rights obligations;
2. Non-discriminatory; and
3. Necessary only for the purpose of obtaining recognition and respect for the rights and freedoms of others and meeting the just and most compelling requirements of a democratic society.

[119] That said, the international understanding of FPIC seems to align more with the justified infringement framework than would appear at first blush. As noted above, the international scholarship is clear that FPIC was not intended to be a general "veto power." Understanding that FPIC is not a veto is an important contextual piece in understanding how to utilise the UNDRIP as an interpretive framework in Canadian law.

[120] Turning to the issues in this application, Kebaowek pointed to several Articles that underscore the importance of FPIC and they argued that these contextual factors ought to have been considered by the Commission when determining if the duty to consult and accommodate had been discharged.

[121] Kebaowek rightly pointed out in their submissions that the scope and content of the duty to consult and accommodate falls along a spectrum. The determinative question is "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation* at para 45).

[122] For the reasons noted above, while the duty to consult and accommodate falls along a spectrum, the high end of the spectrum is not a veto.

[123] The Respondent argued that to the extent the duty to consult and accommodate was triggered, the duty owed to Kebaowek was at the low end of the *Haida Nation* spectrum. The Respondent submitted all that was required was notice, the disclosure of information, and discussion of issues raised by the notice. They go on to argue that in fact, the consultation that occurred in this case was actually at the high end of the spectrum; accordingly, they argue the duty to consult and accommodate was properly discharged.

[124] The Applicant submitted that the UNDRIP is a contextual factor that gives rise to an enhanced obligation to consult. They argued that it would be a mistake to conflate the scope and content of the duty to consult and accommodation with only the section 35 common law obligations, and that the adoption of the UNDRIP into Canadian law now requires more.

[125] I agree.

[126] I am not persuaded by the Respondent's arguments and assertions that Kebaowek is seeking a right to consent, rather than a right to a process. The Respondent's framing of Kebaowek's arguments lead to the binary conclusion set out in their memorandum of argument that the disconnect between the duty to consult and accommodate, and UNDRIP's principle of FPIC, is that "one is a procedural right, while one is a substantive right."

[127] I agree with Kebaowek that the frameworks are similar, but as discussed previously, there are important distinctions between FPIC and the DTCA. Further, as noted by the Honourable Jody Wilson-Raybould, former Minister of Justice and Attorney General of Canada, "[w]ords have meaning. We live in a time where language is often appropriated and misused, co-opted and twisted – made to stand for something it is not" (Jody Wilson-Raybould, "Reconciliation and Restorative Justice", Inaugural Houston Lecture delivered at the Johnson Shoyama Graduate School of Public Policy, University of Saskatchewan, 13 September 2018) [unpublished] online: <https://www.schoolofpublicpolicy.sk.ca/news-events/named-lecture-series/the-houston-lecture.php#PastSpeakers>).

[128] In my opinion, Canada's adoption of the UNDRIP into Canadian law via the *UNDA* must mean more than a status quo application of the section 35 framework. The UNDRIP must be interpreted in the ordinary sense of the words set out. The words of the UNDRIP and the resulting commentary regarding its development and interpretation must be used to guide our interpretation of the section 35 framework, and in this application, how the UNDRIP is to be used to interpret the Crown's analysis of the duty to consult and accommodate.

[129] As was observed by the Supreme Court in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*], "[t]he determination of the content of the

duty to consult will, as *Haida* suggests, be governed by context" (at para 63). In *Mikisew Cree*, the Supreme Court found that modern settlements are an important context that informs the duty to consult and accommodate. Now, the UNDRIP is an added contextual layer that informs the scope and content of the duty to consult and accommodate.

[130] As highlighted above, Article 29(2) states that "no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent." The proposed NSDF is a project that clearly falls within the scope of Article 29(2), thus triggering the UNDRIP FPIC standard. Based on the foregoing, I am of the view that the UNDRIP FPIC standard requires a process that places a heightened emphasis on the need for a deep level of consultation and negotiations geared toward a mutually accepted arrangement. Much of the jurisprudence that has developed in the context of the duty to consult and accommodate confirms that it is not just a mere "check box" exercise; it must be a robust process of consultation.

[131] Similarly, in my opinion, FPIC is a right to a robust process. As explained above, it is not a veto or a right to a particular outcome. Nor is FPIC absolute, as States may infringe UNDRIP rights in certain limited circumstances (Article 46(2)).

[132] The duty to consult and accommodate is an aspect of the justified infringement of section 35 rights framework. I am of the view that the UNDRIP and *UNDA* must be considered when assessing if the Crown fulfilled its duty to consult and accommodate.

[133] The Commission's Decision is silent as to how the UNDRIP applies in the context of the fulfilment of the duty to consult and accommodate. The Decision does not address how the UNDRIP concept of FPIC requires an enhanced and more robust process to ensure that

consultation processes were tailored to consider Kebaowek's Indigenous laws, knowledge, and practices, and that the process was directed towards finding mutual agreement.

[134] The failure to take this important context into account was an error of law.

(b) *Adequacy of consultation process*

[135] In their submissions to the Commission, Kebaowek argued that the consultation process was not adequate and that the process developed by the CNSC did not facilitate Indigenous participation, nor did it respect and honour the Nation-to-Nation relationship in a meaningful way. They indicated that there were processes that the Commission could have adopted that would have facilitated the consultation process sought by Kebaowek, including but not limited to:

- Having Commission hearings or a portion of the hearings in community to facilitate member participation;
- Extending the time for oral submissions at community hearings to permit the necessary time to have a meaningful exchange of ideas and dialogue, as 10 minutes was inadequate; and
- Building in traditional knowledge sharing practices.

[136] A review of the application record highlights that Kebaowek noted that there has been an erosion of trust as a result of the Commission's consultation processes. I am concerned by this. A review of the jurisprudence concerning section 35 rights and the duty to consult and accommodate generally underscores the importance of meaningful dialogue to find pathways forward through "a process of balancing interests, of give and take" (*Haida Nation* at para 48). If there is to be true reconciliation, both parties must engage in a mutual, respectful dialogue that

strives to ensure both parties understand each other's respective interests with the objective of reaching an outcome that is acceptable to both parties. This requires trust and good faith efforts from all parties. In my opinion, the oft-quoted words of former Chief Justice Lamer continue to resonate: "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve what I stated in *Van der Peet, supra,* at para. 31, to be a basic purpose of s. 35(1) – 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay" (*Delgamuukw* at para 186).

[137] The reality underpinning this application for judicial review is that Canadian Nuclear is generating tonnes of LLW and the Site houses Legacy Waste that is not currently stored in a manner that is consistent with modern international industry standards and best practices. The proposed NSDF will better ensure that this volatile waste is stored in a manner that aligns with modern international industry standards, in consideration of the enduring nature of this kind of waste. The issues present in this application are complicated, including the historic taking of the unceded and unsurrendered Site lands in the 1940s that has directly contributed to the current issues concerning the Canadian Nuclear License amendment application to develop the proposed NSDF, which is intended to better contain LLW and Legacy Waste generated as a result of the original land taking.

[138] That said, the FPIC standard that the Commission should have considered in its DTCA analysis indicates that the Commission ought to have considered the consultation process from the Indigenous rights holders' point of view. In other words, it would have been prudent for the Commission to have modified their consultation processes in a manner that addressed some of

Kebaowek's requests and suggestions. In my view, that would have been consistent with the UNDRIP and the FPIC standard.

[139] Process rights must be considered from the perspective of the rights holding collective and must consider the customs, traditions, and laws of the Indigenous rights holders. This ensures that consultation processes are robust and align with the spirit of reconciliation and the continuing evolution of the Canadian legal framework, which now includes the UNDRIP. Processes that meaningfully accommodate the Indigenous collective's perspectives ensure that the necessary trust and give and take required to nourish the ongoing Crown-Indigenous relationship will be reinvigorated and strengthened over time.

[140] Kebaowek provided suggestions to CNSC staff that would enhance the consultation process, and these suggestions were not acted upon. This is not to suggest that tribunals must acquiesce to every suggestion made by an Indigenous Nation; rather, this means tribunals must make reasonable efforts to alter their processes to build in aspects that respect Indigenous laws, knowledge, and processes. Arbitrary time limits for oral submissions and holding hearings in regions a substantial distance from the Indigenous community that make full participation of the Nation difficult are examples of processes that are not aligned with the spirit of the UNDRIP and the FPIC standard.

[141] Before considering the consultation in this case, I think it is important to offer a few words of guidance with respect to the rights holding collective who is owed the duty to consult and accommodate.

[142] It is trite that section 35 rights, including the right to be consulted, are collective rights. Therefore, it is essential to identify the collective that holds the rights and in the context of the

duty to consult and accommodate, to determine which entity(s) to consult with. As observed by Justice LeBel in *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paragraph 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.
>
> [Citations omitted.]

[143] A review of the jurisprudence concerning the duty to consult illustrates that the determination of the rights holding collective is a factual determination. For example, in *Haida Nation*, the duty to consult was owed to the Haida Nation as a whole, including two *Indian Act*, RSC 1985, c I-5 [*Indian Act*] band councils (at para 65). This is consistent with the manner in which the claim was framed and the manner in which the Haida Nation describe themselves (Kent McNeil, "Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority" (2021) 57:1 Osgoode Hall LJ 127 at 157).

[144] Conversely, in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku*], the Supreme Court found that the First Nation as an *Indian Act* band, was owed the duty to consult and accommodate, rather than the Tlingit Nation as a whole.

[145] There are significant practical considerations when determining whom the proper rights holder is and whom the Crown must consult with. Consulting with every one of the 634 recognized band councils in Canada is impractical.

[146] In *Nlaka'pamux Nation Tribal Council v Griffin*, 2009 BCSC 1275 [*Nlaka'pamux Nation*], the BCSC considered the duty to consult and accommodate regarding a proposed extension to the Cache Creek Landfill. I note that the extension of the Cache Creek Landfill is a

project of a similar nature to the NSDF at issue in this application. Additionally, like the situation with the Cache Creek Landfill, there were diverging views amongst Algonquin communities concerning the project.

[147] In that case, the BCSC found that the proposed extension project may impact the section 35 rights and title of the Secwepemc and Nlaka'pamux Nations. A member of the Secwepemc Nation, the Bonaparte Indian Band, supported the project (*Nlaka'pamux Nation* at para 9). One of the issues before the Court was how the duty to consult and accommodate can be fulfilled, taking into account the division of opinion on the proposed project within the Nlaka'pamux Nation. The Court found that when faced with division by representation on behalf of a Nation, "the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration. … It must therefore balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner" (*Nlaka'pamux Nation* at para 73).

[148] On appeal, the British Columbia Court of Appeal ("BCCA") did not agree that the constitutional obligation to consult must be balanced against the Crown's obligation to carry out its statutory duties in an effective manner:

> … The Crown's duty to act honourably toward First Nations makes consultation a constitutional imperative. Difficult as it might have been to fulfill, it could not be compromised in order to make the process more efficient. In saying this, I recognize that the right to consultation is not unlimited. The Supreme Court of Canada's decision in *Taku* establishes that, at some point, the duty to consult may be exhausted.…
>
> [*Nlaka'pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, 2011 BCCA 78 [*Nlaka'pamux Nation BCCA*] at para 68.]

[149] The BCSC found that the Environmental Assessment Office properly implemented consultation protocols with both the Nlaka'pamux Nation Tribal Council and the Ashcroft Band and saw "no objection in principle to requiring the proponents to consult with a specific Band if the government also undertakes appropriate consultation with the First Nation" (emphasis added, *Nlaka'pamux Nation* at para 75, aff'd in 2011 BCCA 78 at para 68). However, the Courts in *Nlaka'pamux Nation* and *Nlaka'pamux Nation BCCA* did not provide guidance concerning how to address the divergent opinions in determining if the duty to consult and accommodate has been fulfilled.

[150] In *Mikisew Cree*, the Supreme Court found there are obligations on First Nations groups to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" (at para 65). In their submissions to the Commission, Kebaowek stated that "[it] is an individual First Nation with its own history, culture and traditions. Accordingly, in the context of consultation, [Kebaowek] must be consulted with as an independent nation and with the recognition of its specific rights." Unfortunately, the record does not clearly reveal how the various Algonquin Anishinabeg Nations work together and collaboratively advance positions on section 35 rights matters such as title, which are held at the Nation level, rather than at the *Indian Act* band level.

[151] The Commission noted that CNSC staff organised consultation and engagement activities relative to the proposed NSDF project since 2016 (Decision at para 324). The CNSC's approach directed consultation and engagement activities with Indigenous Nations and communities identified by CNSC staff as having a potential interest in or that could potentially be impacted by the proposed NSDF project. Communities and Nations were identified based on their proximity

to the Site and those who expressed an interest in staying informed (Decision at para 325). CNSC staff then developed an integrated consultation process that combined the federal EA Process and the CNSC licensing process (Decision at para 326).

[152] A review of the record for this application highlights that the CNSC attempted to ensure that all potentially impacted and interested Indigenous Nations and communities were given an opportunity to participate in consultation and engagement regarding the proposed NSDF. To that end, Canadian Nuclear and the CNSC engaged with the AANTC and Kebaowek in July 2016. The CNSC appears to have assumed that the AANTC would be responsible for coordinating consultation and engagements activities for its member communities, including the Applicant. However, in December of 2021, the AANTC wrote to the CNSC and expressed its concerns that CNSC staff were using the AANTC as a means to "skirt its consultation obligations with the First Nations."

[153] Consistent with the BCCA's approach in *Nlaka'pamux Nation BCCA*, the CNSC attempted to ensure that impacted and interested Indigenous Nations and communities were provided an opportunity to participate in the process. Unfortunately, the record indicates that the engagement agreement reached with the AANTC was misunderstood by CNSC staff, who mistakenly thought the AANTC would coordinate consultation with its member nations, and that this would be sufficient to satisfy their DTCA obligations. Both the AANTC and Kebaowek expressed to the CNSC that this was not acceptable. In light of the late direct engagement with Kebaowek, the Commission issued its procedural direction to permit both Kebaowek and KZA an opportunity to provide comments on the EA Reports and to make submissions to the Commission. With the benefit of hindsight, it would have been useful to have consultation protocol agreements that clarified which entities spoke for and on behalf of rights holders (i.e.,

Indian Act band councils, tribal associations and/or councils, traditional or customary government representatives, or modern governance representatives).

[154] The nature of the rights claimed and asserted by the Applicant are section 35 rights, which as explained above, are held by the Algonquin Nation as a whole. While I acknowledge that some section 35 rights, such as fishing and harvesting, are exercised by individual community members, the rights are enjoyed by the Nation as a whole, not just at the *Indian Act* band level.

[155] Finally, I turn back to the duty to consult and accommodate jurisprudence where the Supreme Court has affirmed that generally, the duty to consult and accommodate is owed to the rights holding collective, rather than individuals (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 35).

[156] In light of this, the CNSC's broad, inclusive approach to consultation with the AANTC and attempts to obtain the views of Kebaowek and other individual *Indian Act* bands, was reasonable. Kebaowek is part of the Algonquin Nation, and both the broader Nation and the individual communities should be included in consultation processes. Kebaowek's perspectives are important and essential to assess whether the Crown discharged its duty to consult and accommodate.

[157] However, Kebaowek is but one voice speaking on behalf of some of the Algonquin Nation rights holders. In my view, this understanding of the proper rights holder aligns with the notions that section 35 rights and UNDRIP rights are not absolute, and in certain circumstances, may be infringed. There is the potential situation that not all members of the rights holding

collective agree on the impacts or proper approach to development activities within their traditional territories.

[158] The record for this application is not entirely clear in terms of the views of the Algonquin Nation as a whole on the impacts of the NSDF project and what, if any, accommodations can and should be made to address those concerns. While it is clear that Kebaowek and other First Nations, for example KZA and the Algonquins of Pikwàkanagàn First Nation ("AOPFN") had concerns about the project. The record suggests that the Nations presented their views to the Commission, however, it is not clear that an Algonquin Nation perspective (representing the view of the Algonquin Nation as a whole) was presented to the Commission. Indeed, KZA and AOPFN have both provided their consent to the project. The record illustrates that the Nations and tribal councils consulted provided significant information as part of the consultation process; however, the record also illustrates that the Nations and tribal councils provided numerous individual reports and studies concerning the impacts of the proposed NSDF and the cumulative impacts of development in the area on Indigenous peoples and communities. It is not clear if all the reports and studies were aligned in terms of the potential impacts and appropriate accommodations.

[159] As noted previously, the duty to consult and accommodate, as well as the FPIC standard and the Articles, do not guarantee a particular result; rather, these duties and obligations are to ensure consultations processes are robust and transparent, and that all impacted rights holders' perspectives are properly considered. Accordingly, in my view, the process ought to have clarified the role of the AANTC and the individual *Indian Act* bands. I appreciate that the Commission was attempting to be inclusive and to consider perspectives of all potentially

impacted Indigenous Nations; however, the failure to clarify respective roles has led to some confusion.

(4) The consultation process and relevant findings of the Commission

[160] At the public hearings on May 30, 2022, and June 2, 2022, Atomic Energy acknowledged that Canada endorsed the UNDRIP without qualification and that it would "advance Canada's UNDRIP objectives." Atomic Energy indicated that they "see FPIC as the foundation for this work." However, Atomic Energy clarified its position that it would "dialogue meaningfully" with Indigenous Nations but would not seek or obtain consent, because "the concept of FPIC neither confers a veto nor requires unanimity."

[161] Similarly, in their final written submissions on August 10, 2023, Canadian Nuclear highlighted that the application of and compliance with the UNDRIP and the concept of FPIC was raised as an issue by various Indigenous and non-Indigenous interveners. They expressed uncertainty as to how the UNDRIP and FPIC standard could be applied in Canadian law, especially because the *UNDA* was adopted after the inception of the proposed NSDF, and the majority of consultation activities had already occurred. Canadian Nuclear took the position that neither applied, but argued that they "sought to seek the support of all interested Indigenous Nations, communities and organizations for the NSDF Project, whether that support is expressed as consent in terms of free, prior and informed consent or otherwise."

[162] The Commission noted that AEC representatives stated that they were "committed to the Government's objectives related to UNDRIP and FPIC." Further, the AEC clarified that they believed "FPIC is about listening and learning, in partnership and respect, and working together in good faith and on decisions that impact rights and interests. … FPIC… does not necessarily

mean having a veto or requiring unanimity in government decision-making" (Decision at para 367).

[163] Further, at a meeting on November 1, 2023, following the conclusions of the public hearings and prior to the Decision, CNSC staff stated it "is supporting Canada's whole-of-government approach to implementing the [*UNDA*]" and that CNSC staff "ensure that [their] approaches to consultation and engagement continue to be aligned with *UNDA*."

[164] The Commission correctly noted that the duty to consult and accommodate Indigenous interests were triggered in this application, and that "[it] must be satisfied that the duty to consult is met prior to making relevant decisions" (Decision at para 323). The Commission then acknowledged that the applicability of and compliance with the UNDRIP and *UNDA* was raised as an issue before it by a number of Indigenous Nations, including Kebaowek, and it recognized Canada's commitment to the UNDRIP (Decision at para 432). However, the Commission did not make a determination on the application of the UNDRIP or the *UNDA*, stating that "the Commission, as a creature of statute, is not empowered to determine how to implement UNDRIP" (Decision at para 432). The Commission then stated that its Decision and assessment of the scope and content of the duty to consult and accommodate would follow the law "as articulated in jurisprudence to date" (Decision at para 432). The Commission's Decision is otherwise silent on the UNDRIP and the *UNDA*.

(5) Nature of Aboriginal rights claimed by the Applicant

[165] Kebaowek has an outstanding Aboriginal title claim. However, the claimed title area does not include the Site nor the lands for the proposed NSDF (Timiskaming, Wolf Lake and Eagle Village Members of the Algonquin Nation: Statement of Assertion of Aboriginal Rights and

Title (11 January 2013), online: <https://new-wordpress.algonquinnation.ca/wp-content/uploads/2013/01/SAR-Overview-2013-01-21-final-ENGs.pdf> ("Title Claim")). A review of the Title Claim indicates that the scope of the geographic area claimed is significant, covering approximately 34,000 square kilometres of the Ottawa Valley, straddling the Ontario-Quebec border. The map attached to the Title Claim illustrates that the claimed area extends south to the town of Deep River, Ontario. The claimed title area does not include the Site, which is located south of the town of Deep River; however, the Applicant noted that the proposed NSDF is adjacent to their Title Claim area and within their broader traditional territory.

[166] The Title Claim area overlaps with other assertions of Aboriginal title by other Algonquin collectives, including AOPFN and KZA. Kebaowek and KZA's asserted Aboriginal title claims are not resolved or recognized by the federal or provincial governments, and the status of the outstanding Title Claim is unknown.

[167] The earlier jurisprudence highlighted above indicates that while consultation aimed at securing consent may be required where Aboriginal title has been recognised or established, where the title claim is outstanding, the nature of the duty to consult and accommodate falls along the *Haida Nation* spectrum and is linked to an assessment of the strength of the claimed section 35 rights. Further, the jurisprudence stresses that Aboriginal title rights are held by the collective Nation as a whole; in other words, the broader Algonquin Nation, not by individual *Indian Act* bands. In the trial decision of *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paragraph 470, the BCSC found that the proper section 35 rights holder is the Nation:

> I conclude that the proper rights holder, <u>whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people</u>. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion.

> The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.
>
> [Emphasis added.]

[168] Further, the BCCA noted that practical difficulties in the identification of the proper rights holder cannot be "allowed to preclude the recognition of Aboriginal rights that are otherwise proven" (*William v British Columbia*, 2012 BCCA 285 at para 151).

[169] In addition to the Title Claim, Kebaowek asserted that the proposed NSDF is located within their traditional territory. As such, they also asserted other section 35 rights, including rights to fish, hunt, trap and gather, and to use the land for social and ceremonial purposes.

[170] The Applicant asserts that they have responsibilities as caretakers of the lands in their traditional territory, including the lands of and around the Site. Frequently, Indigenous communities assert that they have a unique relationship with the land. However, Kebaowek has not provided specific information concerning this relationship and their specific caretaker role within the broader Algonquin Nation. It is unclear from the record how Kebaowek's responsibilities intersect with other Algonquin communities and/or if Kebaowek's caretaker responsibilities differ or are unique to those of other Algonquin communities.

[171] With respect to section 35 rights and title assertions, it is important to acknowledge that the lands currently taken up by Canadian Nuclear have been off-limits to all individuals, including section 35 rights holding collectives, for safety reasons since the 1940s. Put another way, the lands used for the Site, including for the proposed NSDF, have not been used by

Kebaowek or any other Indigenous collective to exercise any section 35 rights since the 1940s. The Site is monitored and portions of it are fenced off to prevent inadvertent use.

[172] In addition to the asserted Aboriginal rights and title, Kebaowek alluded to historic treaties between the Algonquins and the British in the 1700s, and rights stemming from those treaties. These were not land surrender treaties; rather, these treaties confirmed alliances with the British in exchange for respect and protection of Aboriginal rights, including rights flowing from the *Royal Proclamation of 1763* that their lands would be protected from encroachment. However, they did not point to specific provisions within those treaties or specific treaty rights (*Eskasoni First Nation v Canada (Attorney General)*, 2024 FC 1856 at para 9).

[173] In the context of the issues in this application, I do not find Kebaowek's asserted rights grounded in historic treaty to be persuasive. Rather, the implication of Kebaowek's submissions to the Commission on this point is that the Crown failed to respect the treaty relationship and/or the *Royal Proclamation of 1763* when it granted land for use as a nuclear facility without consulting, obtaining the consent of, or compensating the Algonquin peoples. With respect, the original taking of the lands is not before me in this application. While the history is important context and informs the cumulative impacts of the proposed NSDF project, this does not assist the Court in determining if the Crown properly fulfilled its duty to consult and accommodate in respect of the proposed NSDF.

(6) Consultation from an Indigenous lens

[174] We know that the Algonquin Nation, and Kebaowek specifically, were not consulted when the lands for the Site were originally taken up in the 1940s. There has been irreparable permanent damage to the Site lands. The Site is monitored and off limits to the public and

Indigenous Nations who once used and occupied this area. Even if the current facility were closed and the materials removed, it is my understanding that this Site will be unusable for several centuries. Essentially, the taking of lands in this context was tantamount to an implied extinguishment of the Aboriginal interests in the Site (see *Delgamuukw* at para 64). The Indigenous rights holders have been unable to use the lands taken up for almost 70 years, and they will be unable to use the Site lands for several centuries.

[175] Indeed, the Respondent noted in their submissions that the NSDF is a "permanent" disposal proposal. That said, the Respondent provided significant scientific information that highlights that this is a safe option for the disposal of LLW as the proposed NSDF facility is "designed with modern best practice safeguards" to protect the environment and the Ottawa River.

[176] The duty to consult and accommodate process is not intended to provide redress for past wrongs and harms (*Chippewas of the Thames* at para 41). However, this historic backdrop cannot be lost as we try to navigate a way forward.

[177] As discussed above, the duty to consult and accommodate is a procedural duty that is both legal and constitutional in nature. Further, the duty to consult and accommodate must be informed by the UNDRIP and the principles of FPIC, which require robust consultation that is informed by Indigenous perspectives, laws, knowledge, and practices.

[178] Despite arguing that the consultation with Kebaowek was conducted in a manner that is consistent with the deepest end of the *Haida Nation* spectrum, the Commission failed to consider consultation from the perspective of Kebaowek and concluded that the duty to consult and accommodate had been discharged in this case.

[179] With respect, I do not agree.

[180] The Commission did not consider the discharge of the duty to consult and accommodate using the interpretive lens of the Articles and the FPIC standard. This error skewed their analysis of the fulfillment of the duty to consult and accommodate.

[181] The reasons for Decision do not meet the *Vavilov* standard that are "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at para 85).

[182] The Commission highlighted efforts of the proponent to consult with various Indigenous Nations and tribal councils and underscored the efforts of the proponent to safely dispose of hazardous waste materials.

[183] In my view, the Commission's approach to consultation was flawed. The Commission failed to consider the UNDRIP as a contextual factor in assessing the adequacy of Crown consultation. This failure to consider the UNDRIP as an important contextual factor was an error of law. It is clear that the NSDF is a project that falls within Article 29(2) and triggers the FPIC standard. While the FPIC standard is not a veto, it requires significant robust processes tailored to consider the impacted Indigenous Nations laws, knowledge, and practices and employs processes that are directed toward finding mutual agreement. In this case, the record demonstrates that the Commission and the CNSC were not prepared to modify or alter their processes to respond to Kebaowek's requests for accommodation. This was not reasonable and failed to consider the important added contextual factors of the UNDRIP, which must now be considered when assessing the adequacy of Crown consultation.

D. *Did the Commission err in determining that the NSDF is not likely to cause significant adverse environmental effects?*

(1) Sub-delegation of authority

[184] Kebaowek argued that the Commission unreasonably and incorrectly delegated the review and approval of the mitigation measures in the undeveloped FMP to the post-project approval time frame.

[185] The Respondent argued that the *CEAA, 2012* permits the Commission to assess potential impacts of a project, to impose future conditions to address those impacts, and to delegate the administration of those conditions:

Delegation	**Délégation**
26 (1) The responsible authority with respect to a designated project may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (f) of the definition ***jurisdiction*** in subsection 2(1) the carrying out of any part of the environmental assessment of the designated project and the preparation of the report with respect to the environmental assessment of the designated project, but must not delegate the duty to make decisions under subsection 27(1).	**26 (1)** L'autorité responsable d'un projet désigné peut déléguer à un organisme, une personne ou une instance visée à l'un des alinéas a) à f) de la définition de ***instance*** au paragraphe 2(1) l'exécution de tout ou partie de l'évaluation environnementale du projet ainsi que l'établissement du rapport d'évaluation environnementale relatif au projet, à l'exclusion de toute prise de décisions au titre du paragraphe 27(1).
For greater certainty	**Précision**
(2) For greater certainty, the responsible authority must not make decisions under subsection 27(1) unless it is satisfied that any delegated duty or function has been	**(2)** Il est entendu que l'autorité responsable qui a délégué des attributions en vertu du paragraphe (1) ne peut prendre de décisions au titre du paragraphe 27(1) que

performed in accordance with this Act.	si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi.
Responsible authority's or Minister's decisions	**Décisions de l'autorité responsable ou du ministre**
27 (1) The responsible authority or, when the Agency is the responsible authority, the Minister, after taking into account the report with respect to the environmental assessment of the designated project, must make decisions under subsection 52(1).	**27 (1)** Après avoir pris en compte le rapport d'évaluation environnementale relatif au projet désigné, l'autorité responsable ou, si celle-ci est l'Agence, le ministre prend les décisions prévues au paragraphe 52(1).
…	[…]
Decisions of decision maker	**Décisions du décideur**
52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project	**52 (1)** Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible :
(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and	**a)** d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;
(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).	**b)** d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.
…	[…]

Conditions — environmental effects referred to in subsection 5(1)

53 (1) If the decision maker decides under paragraph 52(1)(a) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(1), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the circumstances, the decision maker must establish the conditions in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.

Conditions — effets environnementaux visés au paragraphe 5(1)

53 (1) Dans le cas où il décide, au titre de l'alinéa 52(1)a), que la réalisation du projet désigné n'est pas susceptible d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants ou dans le cas où le gouverneur en conseil décide, en vertu de l'alinéa 52(4)a), que les effets environnementaux visés à ce paragraphe négatifs et importants que la réalisation du projet est susceptible d'entraîner sont justifiables dans les circonstances, le décideur fixe les conditions que le promoteur du projet est tenu de respecter relativement aux effets environnementaux visés à ce paragraphe.

Conditions — environmental effects referred to in subsection 5(2)

(2) If the decision maker decides under paragraph 52(1)(b) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(2), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the

Conditions — effets environnementaux visés au paragraphe 5(2)

(2) Dans le cas où il décide, au titre de l'alinéa 52(1)b), que la réalisation du projet désigné n'est pas susceptible d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants ou dans le cas où le gouverneur en conseil décide, en vertu de l'alinéa 52(4)a), que les effets environnementaux visés à ce paragraphe négatifs et importants que la réalisation

circumstances, the decision maker must establish the conditions — that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority that would permit a designated project to be carried out, in whole or in part — in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.	du projet est susceptible d'entraîner sont justifiables dans les circonstances, le décideur fixe les conditions — directement liées ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre la réalisation en tout ou en partie du projet — que le promoteur du projet est tenu de respecter relativement aux effets environnementaux visés à ce paragraphe.
Conditions subject to exercise of power or performance of duty or function	**Conditions subordonnées à l'exercice d'attributions**
(3) The conditions referred to in subsection (2) take effect only if the federal authority exercises the power or performs the duty or function.	**(3)** Ces dernières conditions sont toutefois subordonnées à l'exercice par l'autorité fédérale des attributions en cause.
Mitigation measures and follow-up program	**Mesures d'atténuation et programmes de suivi**
(4) The conditions referred to in subsections (1) and (2) must include	**(4)** Les conditions visées aux paragraphes (1) et (2) sont notamment les suivantes :
(a) the implementation of the mitigation measures that were taken into account in making the decisions under subsection 52(1); and	**a)** la mise en œuvre des mesures d'atténuation dont il a été tenu compte dans le cadre des décisions prises au titre du paragraphe 52(1);
(b) the implementation of a follow-up program.	**b)** la mise en œuvre d'un programme de suivi.

[186] As noted earlier, the parties agreed that this issue ought to be reviewed on the standard of reasonableness, and I agree.

[187] Also as noted earlier, the well-established approach to statutory interpretation considers the words set out in the legislation in their ordinary and grammatical sense, and with a consideration to the statutory context. The wording of the *CEAA, 2012* supports a conclusion that the Commission must consider post-approval conditions in respect of potential environmental impacts where it has found that the project is not likely to cause significant adverse environmental impacts set out in section 5 (*CEAA, 2012*, section 53; see also *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at para 67 and *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh Nation*] at paras 278–291, 322–351).

[188] The Decision from the Commission confirmed that: Canadian Nuclear committed to the submission of a future FMP, which is in the process of being developed and Kebaowek has been invited to collaborate on its development; CNSC staff must review the FMP and provide comments; no forest clearing will take place until CNSC staff are satisfied that the FMP is adequate to increase the quality and biodiversity of the Site; and CNSC staff committed to overseeing implementation of this plan (Decision at paras 199–204).

[189] The Commission noted that concerns raised by Kebaowek concerning the impacts on wildlife can be mitigated, in particular the populations of eastern wolf and black bear. The Commission noted that the forested area proposed to be cleared for the NSDF represents 1% of the Site, and based on the information presented to them, does not represent a unique habitat for species in the area. In addition, the Commission noted that forest clearing is conditional on the review and acceptance of the FMP (Decision at paras 204–205).

[190] Further, the Commission noted that the mitigation measures the FMP is intended to address were important to secure the consent of the AOPFN, which “is predicated on the

implementation of all commitments and mitigation measures made by [Canadian Nuclear] in relation to the NSDF Project" (Decision at para 368).

[191] Ultimately, the Commission found that the proposed NSDF will not adversely impact the asserted or established section 35 rights, because the Site has been restricted since the 1940s. No Indigenous hunting or harvesting has been permitted on the Site and it is not accessible for traditional uses by Indigenous Nations.

[192] The Federal Court of Appeal has confirmed that a decision maker is not required to have information before it concerning "every technical engineering detail. What is required is that by the end of the… hearing the [decision maker] ha[s] sufficient information before it to allow it to form its recommendation" (*Tsleil-Waututh Nation* at para 346).

[193] The Respondent argued that the delegation of the FMP to CNSC staff is not an improper sub-delegation of authority, and that CNSC staff do not have unlimited discretion. As was noted in *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 [*Morton*], the rebuttable presumption against sub-delegation only applies to discretionary decisions, legislative or adjudicative decisions where the sub-delegate has "discretion to exercise independent judgement" (at para 80). The Court noted that where the presumption of sub-delegation has been rebutted, the question becomes: does the tribunal have "either express or implied statutory authorization" to permit a sub-delegation (*Morton* at paras 80–81)?

[194] I am not persuaded by the Applicant's argument.

[195] In its Decision, the Commission noted that it "carefully weighed the information gathered, both in determining whether and how the concerns raised have been addressed through

the proposed mitigation measures, and in how to assess what is adequate in order for it to discharge its duty within the parameters of the law" (Decision at para 26).

[196] Subsections 26(1) and 27(1) of the *CEAA, 2012* are clear that decision making authority may not be delegated. However, I am not persuaded that the Commission delegated its decision making authority. A careful review of the Decision illustrates that:

- The Commission included specific NSDF project conditions, recommended by CNSC staff, in the amended licence (Decision at para 29);
- The licensing regulatory actions are documented in the *NSDF Licensing Regulatory Actions* and the environmental assessment regulatory commitments are documented in the *NSDF Project Consolidated Commitment Lists*. Both documents set out compliance verification criteria (Decision at para 29);
- The Commission delegated authority for the purpose of licence conditions to specific high-ranking CNSC staff (Decision at para 30);
- CNSC staff are directed by the Commission to track and implement its commitments, to add an explicit commitment to the *NSDF Licencing Regulatory Actions* for the submission of Canadian Nuclear's sustainable FMP, and to ensure that the FMP is adequate to increase quality and biodiversity of the Site's forested habitat (Decision at paras 31-32);
- CNSC staff are directed to report on the status of the NSDF project and to bring any matter that requires their attention to the Commission (Decision at para 35).

[197] Read holistically, the above instructions to CNSC staff are clear indications that the Commission has not delegated its final decision making authority to CNSC staff. Rather, for

unanticipated changes to the FMP, or matters that go beyond oversight, tracking, and implementation of the FMP, CNSC staff are expected to return to the Commission for guidance.

[198] The reasons for Decision meet the *Vavilov* standard, as it "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at para 85). The Commission's Decision and reasons are justified, intelligible, and transparent (*Vavilov* at para 95).

[199] In my view, based on the record before this Court, which includes significant amounts of evidence collected as part of the EA Process and evidence submitted by Kebaowek, as well as a consideration of the Commission's statutory authority, the Decision is reasonable and there was no unlawful delegation of authority to CNSC staff.

(2) Permanent exclusion is unreasonable

[200] Finally, Kebaowek argued that the Commission's failure to consider the impacts to the environment and section 35 rights flowing from Kebaowek's permanent exclusion is unreasonable. They noted that the Commission had two distinct obligations that both require a consideration of the environmental impacts on section 35 rights: first, pursuant to the *CEAA, 2012*; and second, the duty to consult and accommodate framework.

[201] Kebaowek noted that they were never consulted concerning past exclusions from the Site lands, and that the proposed NSDF is a new "permanent" exclusion that triggers the duty to consult and accommodate, and that consultation must take into account the cumulative impacts that development has had on Kebaowek's section 35 rights.

[202] The Respondent submitted the Commission's Decision is reasonable in respect of the impacts on the terrestrial environment, and traditional land and resource use.

[203] The Respondent argued that Kebaowek had mischaracterized the effects of the current Canadian Nuclear operations on the Site. The Respondent noted that there has never been a suggestion that the current exclusions to the Site are temporary or will be lifted in the near or foreseeable future.

[204] The Respondent acknowledged that the impacts of historic and current operations are not "temporary," and have resulted in significant changes to the region. Currently, there is LLW stored on the Site in a manner inconsistent with modern industry standards. The historic and current Canadian Nuclear operations have resulted in irreparable changes to the environment. Access to the Site has been restricted for more than 70 years. Kebaowek and other Indigenous peoples have not been permitted to freely access the site to carry out their section 35 rights to harvest and practice spiritual and other ceremonies since the 1940s.

[205] The Commission considered the current exclusion of Kebaowek from the Site, and concluded the proposed NSDF would not cause additional significant adverse environmental effects on the lands, waters, and resources (*CEAA, 2012*, section 5). Accordingly, pursuant to section 24 of the *NSCA*, the Licence issued to Canadian Nuclear for the Site was amended (Decision at paras 27–28).

[206] The Commission delegated the following responsibilities to CNSC staff to track and implement its commitments to enhance transparency and trust in the regulator: engagement with Indigenous Nations on future Independent Environmental Monitoring Programs related to the NSDF and the Site; the development of long-term relationships with Indigenous Nations and

involving them in ongoing monitoring and oversight of the Site and NSDF; to add an explicit commitment to the *NSDF Licensing Regulatory Actions* for the submission of Canadian Nuclear's sustainable FMP; and to ensure the FMP is adequate to increase the quality and biodiversity of the remaining forested area to offset loss of habitat and the NSDF footprint (Decision at paras 30–32).

> The Commission acknowledges that the NSDF Project is expected to have many phases, beyond this application for a license amendment to authorize its construction. The Commission expects both CNSC staff and [Canadian Nuclear] to continue their respective consultation and engagement activities over the lifecycle of this Project and any subsequent applications to the Commission with all implicated Indigenous rights-holders and their representatives.
>
> With this decision, the Commission authorizes the construction of the NSDF Project only. The Commission does not authorize the future operation of the NSDF. The Commission will consider the operation of the NSDF in a future licensing process…
>
> [Decision at paras 33–34.]

[207] In this case, the Commission noted that the lifespan of the NSDF project goes well into the future and that the approval of the change to the licensing conditions is just one aspect of the proposed NSDF (Decision at para 33). The Commission highlighted the importance of ongoing relationships, consultation, and engagement activities with all implicated Indigenous rights holders (Decision at para 33), which in my view is consistent with the broader objectives of reconciliation.

[208] With respect, the duty to consult and accommodate framework is a forward facing tool that is not designed to address historic grievances. The Supreme Court has noted that the DTCA framework is designed to assess the impacts of current government conduct or decisions, and that "[p]rior and continuing breaches, including prior failures to consult, will only trigger a duty

to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult" (*Rio Tinto Alcan* at para 49).

[209] I do not dismiss the significant fact that the Algonquin have been deprived of a region within their traditional territory for many decades and will continue to be for centuries going forward. However, Kebaowek has not pointed to new or novel adverse impacts that do not follow the original taking of the lands for the purposes of nuclear development from the 1940s.

[210] This is not to diminish the impacts that the proposed NSDF may have on Kebaowek's asserted section 35 rights or has had as a result of the historic use of the Site. I note that in their submissions to the Commission, Kebaowek highlighted the importance of the region and its waters, as well as its interconnectivity to Algonquin customary laws and governance which is "based on watersheds, which served as transportation corridors and family land management units around the Ottawa River Basin."

[211] A review of the record in this application indicates that the Commission considered these submissions, and they did not agree with Kebaowek's assertions. The fact that a party does not agree with a decision does not in and of itself render the decision unreasonable.

[212] The Commission did not consider the discharge of the DTCA using the interpretive lens of the UNDRIP and the standard of FPIC. That was an error of law that skewed their analysis of the fulfillment of the duty to consult and accommodate. However, the Commission appears to have reasonably considered the evidence before them, based on the consultation record, and reached reasonable, supported conclusions on the impacts of the proposed NSDF on the asserted section 35 rights of the Kebaowek.

E. *What is the appropriate remedy?*

[213] The Respondent submitted that where aspects of the Commission's Decision fall short of the applicable standard of review, the matter ought to be remitted back to the Commission for further consultation, engagement, or submissions.

[214] Conversely, the Applicant argued that the only remedy is to quash the Decision and that Canadian Nuclear should re-apply for the licensing amendment, consultation should re-commence, and the CNSC must appoint a new panel to consider the application.

[215] I have found the Commission's determination that they did not have the jurisdiction to consider or apply the UNDRIP and the *UNDA* was an error of law and incorrect. Further, I have found that the Commission unreasonably failed to consider and apply the UNDRIP as an interpretive lens when determining if the duty to consult and accommodate had been discharged in this matter *vis-a-vis* Kebaowek.

[216] In my view, Parliament made a clear choice that the Commission is the appropriate body to determine these questions; accordingly, the matter ought to be remitted back to the Commission.

[217] The Commission erred in determining it did not have the jurisdiction to consider the UNDRIP or the *UNDA* when assessing the fulfillment of the duty to consult and accommodate.

[218] Further, the consultation process in this matter was not adequate. Canadian Nuclear failed to consult in a manner consistent with the new added layer of the UNDRIP and the FPIC standard.

[219] It is not practical at this stage to require the proponent to re-apply and commence the consultation processes a new. Rather, there is an opportunity to correct the process and in my view, a limited remedy is in the public interest.

[220] The Commission that issued the Decision on January 8, 2024, is no longer an entity. The CNSC is therefore directed to bring back the former Commission or strike a new commission to consider the shortcomings in the Decision as set out in these reasons.

[221] Canadian Nuclear and CNSC staff are directed to continue to consult with Kebaowek in a manner that promotes reconciliation and aligns with the principles articulated in the UNDRIP, including the FPIC standard. I appreciate that the consultation process for this proposed project started almost 10 years ago in 2016; however, the failure to approach consultation in a manner that considers the principles articulated in the UNDRIP was an error. Article 29(2) highlights that FPIC is required for the disposal of hazardous materials in the lands or territories of Indigenous peoples. The proposed NSDF will be designed to permanently contain LLW, which will take several centuries to decompose to a safe level. Consultation in the context of such hazardous materials must consider the added context of the UNDRIP and the FPIC standard, and how that informs an assessment of the Crown's fulfillment of the DTCA.

[222] The proposed NSDF project is to ensure that hazardous materials already on the Site are stored in a manner that is consistent with modern industry standards. That does not vitiate the Crown's obligation to approach consultation in respect of the NSDF project in a way that better reconciles Indigenous interests. Set out above are enhanced principles that respect the UNDRIP principles of the FPIC standard, while at the same time acknowledging that FPIC does not equal a veto power.

[223] As noted above, Kebaowek received some funding and consultation activities late in the process, pursuant to the procedural order. In view of this, Canadian Nuclear and CNSC staff are directed to resume these processes with a view to incorporate Kebaowek law, knowledge, and practices into their processes, and to work towards achieving an agreement.

[224] I appreciate that for every day that passes while this process lingers on, that is one more day where LLW is stored in a manner that does not comply with current industrial standards. I am directing that the renewed consultation process set a target completion date of September 30, 2026.

[225] The parties have requested costs. While success on this application is mixed, the Applicant brought forward an application that raised fundamental legal considerations that transcend this application. Accordingly, the Applicant is entitled to partial indemnification. In my view, it is appropriate for an award of costs to the Applicant as set out at the mid-range of Tariff B, Column V, of the *Federal Courts Rules*, SOR/98-106.

V. Conclusion

[226] In this application, the Commission incorrectly determined that it had no jurisdiction to determine if the UNDRIP or the *UNDA* applied to the duty to consult and accommodate.

[227] Further, the Commission erred in its assessment of the fulfillment of the duty to consult and accommodate, in its failure to consider the UNDRIP and the FPIC standard as an important contextual factor and/or interpretive lens.

[228] That said, the Commission's Decision concerning the impacts of the proposed NSDF is reasonable and did consider the potential impacts on Kebaowek's section 35 rights.

[229] Accordingly, this matter is remitted back to the Commission, or a newly struck commission, to address the jurisdictional question and to re-assess the Crown's fulfillment of the duty to consult and accommodate, in view of the application of the UNDRIP and the FPIC standard.

JUDGMENT in T-227-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in part.

2. Canadian Nuclear and CNSC are directed to resume consultation with Kebaowek with a view to implementing the UNDRIP FPIC standard in a robust manner, by adapting its processes to address Indigenous laws, knowledge, and processes and to develop a process that is aimed at reaching an agreement. This process is to be completed on or before September 30, 2026.

3. Following this consultation process, the Commission is directed to reconsider if the duty to consult and accommodate in this case was fulfilled in view of the principles articulated in the UNDRIP and in particular, the FPIC standard.

4. The Applicant is awarded costs, pursuant to Tariff B, Column V.

"Julie Blackhawk"
Judge

ANNEX A: GLOSSARY OF TERMS AND ABBREVIATIONS

AANTC	Algonquin Anishinabeg Nation Tribal Council
Action Plan	*United Nations Declaration on the Rights of Indigenous Peoples Act* Action Plan
AEC	Atomic Energy of Canada Limited
AOPFN	Algonquins of Pikwàkanagàn First Nation
Applicant	Kebaowek First Nation
Articles	Articles of the *United Nations Declaration on the Rights of Indigenous Peoples*
Atomic Energy	Atomic Energy of Canada Limited
BCCA	British Columbia Court of Appeal
BCSC	Supreme Court of British Columbia
Canadian Nuclear	Canadian Nuclear Laboratories Ltd.
CEAA, 2012	*Canadian Environmental Assessment Act, 2012*
CFA	Consultation Framework Agreement
CFJ	Missing and Murdered Indigenous Women and Girls Calls for Justice
Charter	*Canadian Charter of Rights and Freedoms*
CNSC	Canadian Nuclear Safety Commission, in its capacity as organization
Commission	Canadian Nuclear Safety Commission, in its capacity as tribunal
Constitution Act, 1982	*Constitution Act, 1982*, Schedule B, *Canada Act 1982*
CTA	Truth and Reconciliation Commission of Canada Calls to Action
Decision	Decision of the Canadian Nuclear Safety Commission dated January 8, 2024
Declaration	*United Nations Declaration on the Rights of Indigenous Peoples*
Director	Canadian Nuclear Safety Commission Director of Indigenous and Stakeholder Relations Division
DRIPA	British Columbia's *Declaration on the Rights of Indigenous Peoples Act*
DTCA	Duty to consult and accommodate
EA Process	Environmental assessment process
EA Report	Environmental Assessment Report
FMP	Forest Management Plan
FPIC	Free, prior and informed consent
IACHR	Inter-American Court of Human Rights
Indian Act	*Indian Act*
Interpretation Act	*Interpretation Act*
Kebaowek	Kebaowek First Nation
KZA	Kitigan Zibi Anishinabeg
Legacy Waste	Waste generated and stored at the Canadian Nuclear Laboratories site over the last 75 years
Licence	Nuclear Research and Test Establishment Operating Licence
LLW	Low-level nuclear waste

NSCA	*Nuclear Safety and Control Act*
NSDF	Near Surface Disposal Facility
Respondent	Canadian Nuclear Laboratories Ltd.
Section 35 rights	Section 35 Aboriginal and treaty rights (of the *Indian Act*)
Site	Chalk River Laboratories site
Supreme Court	Supreme Court of Canada
Title Claim	Timiskaming, Wolf Lake and Eagle Village Members of the Algonquin Nation: Statement of Assertion of Aboriginal Rights and Title
UNDA	*United Nations Declaration on the Rights of Indigenous Peoples Act*
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples*
Vienna Convention	*Vienna Convention on the Law of Treaties*

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-227-24
STYLE OF CAUSE:	KEBAOWEK FIRST NATION v CANADIAN NUCLEAR LABORATORIES
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APPEARANCES:

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