

INNOVATIVE REGULATORY APPROACHES TO INDIGENOUS RIGHTS IN CANADA'S NEW NUCLEAR WORLD

By Kate Babony and Ashley Bach

Overview



Durham Region is Canada's nuclear energy epicentre and generational projects are underway. The Region is on the traditional and treaty territory of four Michi Saagiig Nations and three Chippewa Nations, collectively known as the Williams Treaties First Nations.¹ The Canadian Nuclear Safety Commission ("CNSC") is the

Crown agency responsible for regulating nuclear energy and materials.²

[Kate Babony](#), [Scott Stoll](#) and the team at Foglers are honoured to work in partnership with our clients to advance their interests and position as governments in the face of these generational projects. Together, our groundbreaking approaches are setting high standards for government-to-government relationships in regulatory hearings, properly reflecting the Nations' inherent status as regulators of their own land.

This newsletter has two parts:

Part 1 - a short overview of Durham's nuclear projects; and

Part 2 - three innovative First Nations' regulatory advancements, including:

- 1) Operationalizing the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), including Free, Prior and Informed Consent ("FPIC");
- 2) Upholding Inherent Jurisdiction through regulatory hold-points; and
- 3) Incorporating Indigenous cultural practices into hearings.

Part 1: Durham Region - Canada's Nuclear Industry Epicentre

Durham has four concurrent nuclear energy projects at various development stages: the Pickering Nuclear Generating Station ("PNGS"), the Darlington Nuclear Generating Station ("DNGS"), the Darlington New Nuclear Project ("DNNP"), and the Port Hope Site. The PNGS and DNGS are currently in refurbishment and relicensing phases, while the DNNP has received its Licence to Construct ("LTC") and the newest site, Port Hope, is at the earliest proposal stage.



[Kate Babony](#)
Associate

t: 416.864.7609
kbabony@foglers.com



Ashley Bach
Student

t: 416.966.2999
abach@foglers.com

Fogler, Rubinoff LLP
Lawyers
Scotia Plaza
40 King Street West
Suite 2400, PO Box #215
Toronto, ON M5H 3Y2
t: 416.864.9700
f: 416.941.8852
foglers.com

Longstanding Nuclear Generating Stations are Renewing their Licenses

The PNGS and DNGS are some of the oldest and largest nuclear stations in Canada, operating since 1982 and 1990 respectively.³ Ontario Power Generation ("OPG") recently submitted a request to the CNSC to renew both stations' Power Reactor Operating Licences ("PROL"). OPG applied for a first-of-its-kind 30-year renewal for the DNGS. A two-part hearing was held earlier this year and the CNSC's Commission ("Commission") released its decision on September 24, 2025. To our delight, the Commission agreed with our position that a 20-year licence was more appropriate than 30 years. The Commission stated in their Record of Decision at para 379:

The Commission finds that it is upholding the Honour of the Crown and fulfilling its constitutional obligations with regard to Indigenous engagement, interpreted through the lens of UNDRIP. While the Commission is satisfied that a 30-year licence period would be appropriate from a technical and regulatory perspective, the Commission has heard the Michi Saagiig Nations' request that the licence period for the renewed licence for this existing facility be limited to 20 years. This submission is one of the reasons the Commission settled on a 20-year licence term.⁴

OPG has also applied for a ten-year PROL for the PNGS, starting on January 1, 2027.⁵ The CNSC will hold a two-part hearing in 2026 to consider the PROL.

The DNNP, Small Modular Reactors, and a National Interest Project

The DNNP is the first station in North America licenced to implement the use of Small Modular Reactors ("SMR").⁶ Construction is underway for the first SMR, while at the same time, OPG is pursuing regulatory approvals and licensing to build three more SMRs at the site.⁷

Most recently, the DNNP was referred to the new Major Projects Office ("MPO") by the Prime Minister.⁸ While not officially listed as a National Interest Project under the *Building Canada Act*, SC 2025, c 2, s 4 (formerly Bill C-5),⁹ the Prime Minister identified the DNNP as being of national importance and potentially requiring federal assistance when he referred it to the MPO.¹⁰ The Michi Saagiig Nation Chiefs addressed this announcement in mid-September, stating that they are "currently engaged in good-faith discussions with OPG" and are "working towards an agreement grounded in our informed consent."¹¹ The Chiefs cautioned the MPO and Federal Government that "comprehensive consultation and accommodation" is necessary before accelerating the DNNP's development.¹²

OPG is Looking at Port Hope as A Potential New Project Site

The Port Hope site is the existing OPG Wesleyville site which is being considered for nuclear power generation. The Ontario government directed OPG to assess whether Rightsholders, including the Michi Saagiig Nations, and municipalities would be interested in hosting the project.¹³ Consultation has recently begun.

PART 2: Three Advancements First Nations can Implement with Federal Regulatory Bodies

Our work with clients on nuclear activities has demonstrated three advancements which First Nations can implement with federal regulatory bodies:

- (1) Operationalizing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including Free, Prior and Informed Consent (FPIC);
- (2) Upholding Inherent Jurisdiction through regulatory hold-points; and
- (3) Incorporating Indigenous cultural practices into hearings.

1. Operationalizing UNDRIP and FPIC with Federal Regulatory Bodies

Both Canada's and the Courts' approaches to Indigenous rights have evolved considerably since the start of the nuclear era. For example, *Haida*,¹⁴ decided by the Supreme Court of Canada in 2004, requires the Crown to fulfill its duty consult and accommodate ("DtCA") Indigenous peoples and communities when it contemplates decisions and conduct which may adversely impact their Rights. As well the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 came into force on June 21, 2021, requiring federal legislation and agencies to be in compliance with the UNDRIP, including FPIC.¹⁵

Regardless of any advancements in the law, the Crown has been obliged to uphold the Honour of the Crown in its dealings with Indigenous Peoples and communities since 1763.¹⁶ This involves layered consultation including, *but not limited to*, the DtCA.¹⁷ The DtCA is often looked at as the ceiling for upholding the Crown's honour, but it is simply one floor. Ensuring First Nations are truly treated with the Honour of the Crown is more complex and must now include consideration of UNDRIP and FPIC.

The CNSC has been struggling to figure out what their UNDRIP requirements are. Despite their sister agency, the Canadian Energy Regulator, fully embracing it, the CNSC's Indigenous Consultation document, *REGDOC 3.2.2, Indigenous Engagement, Version 1.2*, has no mention of UNDRIP.¹⁸ And despite recently losing a judicial review on this issue, the CNSC is still grappling with how to implement proper UNDRIP considerations, including operationalizing FPIC.¹⁹

To ensure the federal regulator is in line with the law, we have advanced the role of UNDRIP and FPIC through our hearing records and oral arguments and continue to push for it to become a unified standard at the CNSC. We anticipate the overhaul of *REGDOC 3.2.2* and will ensure the Nations' perspectives are included.

We are also advancing the concept of an integrated First Nations Advisory Committee to ensure there are no gaps in information being provided freely and prior to decisions to allow the Nations' consent to be sought. We have been successful in part with the Commission determining that UNDRIP must play a role in consultation. However, the Commission has relegated UNDRIP to an interpretive tool when fulfilling the DtCA, which falls short of the legal requirements set out in *Kebaowek*.²⁰

Advocating for UNDRIP implementation factored into reduced licence length, the requirement for on-going consultation, and the creation of a regulatory hold-point through a licence condition for the DNNP and DNGS, which we consider successes for our clients.

2. Upholding Inherent Jurisdiction Through Regulatory Hold-Points

One of our main points of contention with the CNSC is their position which sees treaty First Nations as stakeholders, akin to third party interest. However, the treaty First Nations are Rightsholders. They have agreements with the province and Canada to be treated as governments in their own right. This positionality means the Nations retain decision-maker power, also known as consent, over issues which impact their Rights.

The results of our work with the CNSC on their understanding of the Nations' positions as governments and what consent looks like can be seen in the first-of-its-kind, site-specific licence conditions regarding Indigenous engagement implemented in the DNNP's LTC.

Condition 15.4 of the DNNP's LTC requires the licensee (OPG) to "conduct Indigenous engagement activities, specific to the DNNP, throughout the period of this licence."²¹ Licence-long engagement with the Michi Saagiig Nations is crucial because of the potential for new and/or cumulative impacts on the Michi Saagiig Nations' Rights and interests, and the ongoing need for additional regulatory authorizations throughout the DNNP's lifecycle.²²

Condition 15.4 of the DNNP's LTC also empowers the Michi Saagiig Nations to hold OPG accountable for its commitments to upholding their Rights and commitments.²³ The CNSC staff will verify OPG's participation and collaboration as part of their compliance verification activities under Condition 15.4.²⁴

The success of this licence condition is not limited to the DNNP's LTC. We are also happy that the most recent DNGS PROL decision includes a similar licence condition, Condition G.7.²⁵ The additional oversight from Condition G.7 will help ensure that the Michi Saagiig Nations are meaningfully engaged and consulted with, in line with UNDRIP and FPIC, during the DNGS's lifecycle. Elevating the Nations' position as regulators is catching on and our intent is that this becomes standard practice.

Despite these acknowledgements, the Nations are still not a party to the hearings and must reapply for intervenor status for each licensing decision. This is not representative of their position and creates an inequity. We are hopeful that as the Commission continues to grow their understanding of First Nations as governments, they will amend their procedures to ensure local Nations are treated as governments, instead of intervenors, when applications for licensing decisions are made.

3. Incorporating Indigenous Cultural Practices at Hearings

The Michi Saagiig Nations have worked closely with CNSC's regulator to incorporate appropriate cultural practices at recent nuclear licensing hearings. Through respectful dialogue and openness to logistical changes, successful advancements have included practices such as smudging,²⁶ giving and receiving of tobacco, opening and closing prayers from Elders, and the orientation of tables to be more circular.²⁷ We also held eagle feathers during oral submission, in line with Michi Saagiig cultural traditions.²⁸ Michi Saagiig presenters also made space for their traditional introductions in Anishinaabemowin (Ojibway language), which the CNSC honoured, despite only having English and French as their two officially recognized operations languages.²⁹

To us, integration of the cultural practices is part of equality and respect for the position of the Michi Saagiig Nations as the first governments in these lands. The CNSC, however, considered the integration of cultural practices an accommodation and a way to advance FPIC.³⁰

To be clear the integration of cultural practices are not accommodations, nor are they tied to FPIC. They are practices which should be normalized across all regulatory bodies working with Indigenous nations. They show respect for the Michi Saagiig Nations' cultures, ways of knowing and being, and positions as Rightsholders. The Michi Saagiig Nations' leadership in this area, the CNSC's openness, and the understanding between them is demonstrative of a positive path forward.

Conclusion

While there is still much work to be done, the recent advancements of Indigenous rights and positionality through innovative approaches are hopeful. We will continue to push for proper application of UNDRIP in regulatory proceedings, promotion and protection of Indigenous and Treaty Rights, and ensuring First Nations' positions as governments are properly reflected in their positions as parties to hearings, not intervenors.

Fogler Rubinoff's Indigenous Practice Department is always here to support you and your Indigenous Nation on matters related to nuclear power, Ontario Power Generation, and the new Major Projects Office. The Indigenous Practice Department can be reached at 416.864.9700.

This newsletter does not provide legal advice; it is for information purposes only. The clients mentioned within have consented to being identified and have publicly identified Fogler, Rubinoff LLP as their legal counsel on related matters. No confidential information about matters has been shared within this newsletter.

¹ Durham Region, "Indigenous Land Acknowledgement" (last visited 18 September 2025), online: <<https://www.durham.ca/en/regional-government/land-acknowledgements.aspx>>; Canada, *Treaty Research Report: The Williams Treaties (1923)*, by Robert J Surtees (Ottawa: Department of Indian and Northern Affairs Canada, 1986) at 1, online: <<https://www.rcaanc-cimac.gc.ca/eng/1100100029000/1564415701529>>.

² Government of Canada, "Canadian Nuclear Safety Commission" (last visited 18 September 2025), online: <<https://www.cnsccs.gc.ca/eng/>>; *Nuclear Safety and Control Act*, SC 1997, c 9 [NSCA].

³ Ontario Power Generation, "Pickering Nuclear Generating Station" (last visited 18 September 2025), online: <<https://www.opg.com/power-generation/our-power/nuclear/pickering-nuclear/>>; Ontario Power Generation, "Darlington Nuclear Station" (last visited 1 October 2025), online: <<https://www.opg.com/power-generation/our-power/nuclear/darlington-nuclear/>>.

⁴ Canadian Nuclear Safety Commission, *Record of Decision in the Matter of the Ontario Power Generation Inc.'s Application to Renew the Power Reactor Operating Licence for the Darlington Nuclear Generating Station*, DEC 25-H2 (Ottawa: Canadian Nuclear Safety Commission, 24 September 2025) at para 379 [CNSC DNGS PROL RoD].

⁵ Ontario Power Generation, "Our nuclear operating licences" (last visited 18 September 2025), online: <<https://www.opg.com/power-generation/our-power/nuclear/operating-licences/>>.

⁶ Ontario Power Generation, "Darlington SMR" (last visited 18 September 2025), online: <<https://www.opg.com/projects-services/projects/nuclear/smr/darlington-smr/>> [Darlington SMR].

⁷ Darlington SMR, *ibid*.

⁸ Prime Minister of Canada, News Release, "Prime Minister Carney announces first projects to be reviewed by the new Major Projects Office" (11 September 2025), online: <<https://www.pm.gc.ca/en/news/news-releases/2025/09/11/prime-minister-carney-announces-first-projects-be-reviewed-new>> [PM News Release]; Major Projects Office, "Projects for further review" (last visited 1 October 2025), online: <<https://www.canada.ca/en/privy-council/major-projects-office/projects/national.html#2>> [Major Projects Office].

⁹ *Building Canada Act*, SC 2025, c 2, s 20; PM News Release, *ibid*; Major Projects Office, *ibid*.

¹⁰ PM News Release, *ibid*.

¹¹ Michi Saagiig Anishinaabeg Chiefs, Statement, "Statement from the Michi Saagiig Nation Chiefs Regarding the Advancement of the Darlington New Nuclear Project (DNNP) to the Major Projects Office" (12 September 2025), online: <<https://nationtalk.ca/story/statement-from-the-michi-saagiig-nation-chiefs-regarding-the-advancement-of-the-darlington-new-nuclear-project-dnnp-to-the-major-projects-office>> [Michi Saagiig Chiefs Statement].

¹² Michi Saagiig Chiefs Statement, *ibid*.

¹³ Ontario Power Generation, "Port Hope" (last visited 18 September 2025), online: <<https://www.opg.com/projects-services/projects/new-generation-opportunities/Port Hope/>>.

¹⁴ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16-17, 25 [Haida].

¹⁵ *United Nations Declaration Act*, SC 2021, c 14.

¹⁶ *Royal Proclamation of 1763*, RSC 1970, Appendix II, No 1.

¹⁷ *Haida*, *supra* note 14 at paras 16-17, 25.

¹⁸ Canadian Nuclear Safety Commission, *REGDOC-3.2.2, Indigenous Engagement, Version 1.2* (Ottawa: Canadian Nuclear Safety Commission, 2022), online: <<https://www.cnsccs.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc3-2-2-v1-2/>>.

¹⁹ *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at paras 226-229 [Kebaowek].

²⁰ *Kebaowek*, *ibid*; Canadian Nuclear Safety Commission, *Record of Decision in the Matter of the Canadian Nuclear Laboratories' Application to amend the Nuclear Research and Test Establishment Operating Licence for the Chalk River Laboratories site to authorize the construction of a Near Surface Disposal Facility*, DEC 22-H7 (Ottawa: Canadian Nuclear Safety Commission, 8 January 2024).

²¹ Canadian Nuclear Safety Commission, *Record of Decision in the Matter of the Ontario Power Generation Inc.'s Application for a Licence to Construct one BWRX-300 Reactor at the Darlington New Nuclear Project Site*, DEC 24-H3 (Ottawa: Canadian Nuclear Safety Commission, 4 April 2025) at paras 16 and 485, online: <<https://api.cnsccs.gc.ca/dms/digital-medias/CMD24-H3-ROD-EN.pdf/object>> [CNSC DNNP RoD].

²² CNSC DNNP RoD, *ibid* at paras 388-394, 488.

²³ CNSC DNNP RoD, *ibid* at paras 389-392.

²⁴ CNSC DNNP RoD, *ibid* at para 390.

²⁵ CNSC DNGS PROL RoD, *supra* note 4 at paras 388-389.

²⁶ Canadian Nuclear Safety Commission, "Stream: 4. Michi Saagiig Nations Opening remarks, Ontario Power Generation Inc.: Application for a licence to construct one BWRX-300 reactor at the Darlington New Nuclear Project Site (DNNP), 5. Presentation from Michi Saagiig Nations before the break" (8 January 2025) at 01m:19s, online (video): <https://cnsccs.isilive.ca/2025-01-08_14/2025-01-08-3H.html> [Michi Saagiig DNNP Submission].

²⁷ Michi Saagiig DNNP Submission, *ibid* at 02m:06s; Canadian Nuclear Safety Commission, "Stream: 2. Ontario Power Generation Inc.: Application to renew its Nuclear Power Reactor Operating Licence for the Darlington Nuclear Generating Station: Michi Saagiig Nations opening remarks after the lunch break, Presentation from Michi Saagiig Nations before the afternoon break" (24 June 2025) at 01m:25s, online (video): <https://cnsccs.isilive.ca/2025-06-24_26/2025-06-24-4H.html> [Michi Saagiig DNGS Submission].

²⁸ Michi Saagiig DNGS Submission, *ibid* at 02m:38s; Canadian Nuclear Safety Commission, "Stream: 1. Opening remarks, 2. Ontario Power Generation Inc.: Application to renew its Nuclear Reactor Operating Licence for the Darlington Nuclear Generating Station: Presentation by Ontario Power Generation Inc." (24 June 2025) at 05m:53s, online (video): <https://cnsccs.isilive.ca/2025-06-24_26/2025-06-24-1H.html> [DNGS Opening].

²⁹ Michi Saagiig DNGS Submission, *ibid* at 02m:38s; DNGS Opening, *ibid*, at 05m:39s.

³⁰ CNSC DNNP RoD, *supra* note 21 at para 386.