Federal Court of Appeal | Cour d'appel fédérale

Date: 20261016

Docket: A-112-25

Citation: 2026 FCA 174

2026 FCA 174 (CanLII)

CORAM: **WEBB J.A.**
MONAGHAN J.A.
PAMEL J.A.

BETWEEN:

CANADIAN NUCLEAR LABORATORIES LTD.

Appellant
(Respondent by cross-appeal)

and

KEBAOWEK FIRST NATION

Respondent
(Appellant by cross-appeal)

and

ALGONQUINS OF PIKWAKANAGAN FIRST NATION,
MINING ASSOCIATION OF CANADA,
CANADIAN NUCLEAR ASSOCIATION and
SAUGEEN OJIBWAY NATION

Interveners

Heard at Ottawa, Ontario, on October 8, 2025.

Additional written submissions were filed by the parties on
January 16, January 30 and February 6, 2026.

Judgment delivered at Ottawa, Ontario, on October 16, 2026.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: MONAGHAN J.A.
PAMEL J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Canadian Nuclear Safety Commission (the Commission) authorized the construction of the proposed near surface disposal facility (NSDF) on the Chalk River Laboratories site (the Site) that would be used to store low-level radioactive waste (LLW). The issue in this appeal is whether the Commission erred in failing to consider the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the free, prior and informed consent (FPIC) standard as stipulated therein in relation to the approval of this project.

[2] The Federal Court found that the Commission had erred in failing to consider UNDRIP and the FPIC standard in assessing whether the Crown had fulfilled its duty to consult and accommodate. The Federal Court remitted the matter back to the Commission (or a newly formed commission) to resume consultations with Kebaowek First Nation (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". Following this consultation process, the Commission was to reconsider whether the Crown had fulfilled its duty to consult and accommodate in view of the application of UNDRIP and the FPIC standard (2025 FC 319). The Federal Court did not set aside the decision of the Commission.

[3] Canadian Nuclear Laboratories Ltd. (CNL) appealed the decision of the Federal Court and Kebaowek cross-appealed seeking an order that the decision of the Commission be set aside

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and remitted to the Commission for reconsideration. For the reasons that follow, I would allow this appeal and dismiss the cross-appeal.

[4] It should be noted that this case is not about whether the honour of the Crown required the Commission to consult with Kebaowek or any other Indigenous Nation. The Commission, as noted below, acknowledged that it had a duty to engage and consult with a number of Indigenous Nations and communities. The only issue in this appeal is whether, as a result of the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (the *UNDA*), any obligations, in addition to those arising from the existing law related to the duty to consult and accommodate, have been imposed on the Commission in relation to Kebaowek.

I. UNDRIP

[5] UNDRIP is an international declaration that sets out certain rights of Indigenous peoples. It was adopted by the General Assembly of the United Nations in 2007, with Canada being one of the four countries voting against the adoption of the declaration. UNDRIP contains 24 preambulatory clauses and 46 articles. As noted by the British Columbia Court of Appeal in *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 (*Gitxaala*), at paragraph 66, "[a]s a General Assembly resolution, *UNDRIP* does not create or impose new international legal rights or obligations, nor is it formally binding as a treaty. Rather, it is a statement of internationally recognized human rights and standards".

[6] The articles that are particularly relevant in this appeal are Articles 29(2), 32(2) and 46:

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Article 29	**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.	**2.** Les États prennent des mesures efficaces pour veiller à ce qu'aucune matière dangereuse ne soit stockée ou déchargée sur les terres ou territoires des peuples autochtones sans leur consentement préalable, donné librement et en connaissance de cause.
Article 32	**Article 32**
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.	**2.** Les États consultent les peuples autochtones concernés et coopèrent avec eux de bonne foi par l'intermédiaire de leurs propres institutions représentatives, en vue d'obtenir leur consentement, donné librement et en connaissance de cause, avant l'approbation de tout projet ayant des incidences sur leurs terres ou territoires et autres ressources, notamment en ce qui concerne la mise en valeur, l'utilisation ou l'exploitation des ressources minérales, hydriques ou autres.
Article 46	**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.	**1.** Aucune disposition de la présente Déclaration ne peut être interprétée comme impliquant pour un État, un peuple, un groupement ou un individu un droit quelconque de se livrer à une activité ou d'accomplir un acte contraire à la Charte des Nations Unies, ni considérée comme autorisant ou encourageant aucun acte ayant pour effet de détruire ou d'amoindrir, totalement ou partiellement, l'intégrité territoriale ou l'unité politique d'un État souverain et indépendant.
2. In the exercise of the rights enunciated in the present Declaration,	**2.** Dans l'exercice des droits énoncés dans la présente Déclaration, les droits

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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.	de l'homme et les libertés fondamentales de tous sont respectés. L'exercice des droits énoncés dans la présente Déclaration est soumis uniquement aux restrictions prévues par la loi et conformes aux obligations internationales relatives aux droits de l'homme. Toute restriction de cette nature sera non discriminatoire et strictement nécessaire à seule fin d'assurer la reconnaissance et le respect des droits et libertés d'autrui et de satisfaire aux justes exigences qui s'imposent dans une société démocratique.
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.	**3.** Les dispositions énoncées dans la présente Déclaration seront interprétées conformément aux principes de justice, de démocratie, de respect des droits de l'homme, d'égalité, de non-discrimination, de bonne gouvernance et de bonne foi.

[7] Article 29(2) relates to the storage or disposal of hazardous material in Indigenous peoples' lands or territories. Article 32(2) relates to projects that affect such lands or territories and their other resources. Article 46 provides for a limitation on the exercise of rights granted under UNDRIP, provided the limitation satisfies the requirements of this article.

[8] The *UNDA* was enacted in 2021. The *UNDA* has 22 recitals and 7 sections. The 7 sections of the *UNDA* are as follows:

Short title	**Titre abrégé**
1 This Act may be cited as the *United Nations Declaration on the Rights of*	**1** *Loi sur la Déclaration des Nations Unies sur les droits des peuples*

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Indigenous Peoples Act.

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

Declaration means the United Nations Declaration on the Rights of Indigenous Peoples that was adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on September 13, 2007 and that is set out in the schedule.

Indigenous peoples has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.

Minister, for the purposes of any provision of this Act, means the federal minister designated as the Minister for the purposes of that provision under section 3.

(2) [Repealed, 2024, c. 30, s. 35]

Clarification

(3) Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.

Designation of Minister

Order designating Minister

3 The Governor in Council may, by order, designate any federal minister to be the Minister for the purposes of any provision of this Act.

autochtones.

Définitions et interprétation

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

Déclaration La Déclaration des Nations Unies sur les droits des peuples autochtones, adoptée par l'Assemblée générale des Nations Unies le 13 septembre 2007 par sa résolution 61/295, dont le texte figure à l'annexe.

ministre Le ministre fédéral désigné, en vertu de l'article 3, pour l'application de telle disposition de la présente loi.

peuples autochtones S'entend au sens de *peuples autochtones du Canada*, au paragraphe 35(2) de la *Loi constitutionnelle de 1982*.

(2) [Abrogé, 2024, ch. 30, art. 35]

Précision

(3) La présente loi n'a pas pour effet de retarder l'application de la Déclaration en droit canadien.

Désignation du ministre

Décret

3 Le gouverneur en conseil peut, par décret, désigner tout ministre fédéral à titre de ministre chargé de l'application de telle disposition de la présente loi.

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Purposes of Act

Purposes

4 The purposes of this Act are to

(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and

(b) provide a framework for the Government of Canada's implementation of the Declaration.

Objet de la loi

Objet

4 La présente loi a pour objet :

a) de confirmer que la Déclaration constitue un instrument international universel en matière de droits de la personne qui trouve application en droit canadien;

b) d'encadrer la mise en œuvre de la Déclaration par le gouvernement du Canada.

Measures for Consistency of Laws and Achieving the Objectives of the Declaration

Consistency

5 The Government of 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.

Mesures visant la compatibilité des lois et l'atteinte des objectifs de la Déclaration

Compatibilité

5 Le gouvernement du Canada, en consultation et en collaboration avec les peuples autochtones, prend toutes les mesures nécessaires pour veiller à ce que les lois fédérales soient compatibles avec la Déclaration.

Action plan

6 (1) The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.

Plan d'action

6 (1) Le ministre élabore et met en œuvre, en consultation et en collaboration avec les peuples autochtones et d'autres ministres fédéraux, un plan d'action afin d'atteindre les objectifs de la Déclaration.

Content

(2) The action plan must include

(a) measures to

Contenu

(2) Le plan d'action comporte notamment :

a) des mesures visant, selon le cas :

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(i) address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons, and

(i) à lutter contre les injustices, à combattre les préjugés et à éliminer toute forme de violence, de racisme et de discrimination, notamment le racisme et la discrimination systémiques, auxquels se heurtent les peuples autochtones, ainsi que les aînés, les jeunes, les enfants, les femmes et les hommes autochtones, les Autochtones handicapés et les Autochtones de diverses identités de genre ou bispirituels,

(ii) promote mutual respect and understanding as well as good relations, including through human rights education; and

(ii) à promouvoir le respect et la compréhension mutuels et de bonnes relations, notamment grâce à de la formation sur les droits de la personne;

(b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.

b) des mesures de contrôle ou de surveillance, des voies de recours, des mesures de réparation ou d'autres mesures de reddition de comptes en lien avec la mise en œuvre de la Déclaration.

Other elements

(3) The action plan must also include measures related to monitoring the implementation of the plan and reviewing and amending the plan.

Autres éléments

(3) Le plan d'action comporte également des mesures concernant le suivi de sa mise en œuvre, son examen et sa modification.

Time limit

(4) The preparation of the action plan must be completed as soon as practicable, but no later than two years after the day on which this section comes into force.

Délai

(4) Il doit être élaboré dès que possible ou, au plus tard, dans les deux ans suivant la date d'entrée en vigueur du présent article.

Tabling in Parliament

(5) The Minister must cause the action plan to be tabled in each House of

Dépôt au Parlement

(5) Dès que possible, le ministre fait déposer le plan d'action ainsi élaboré

Parliament as soon as practicable after it has been prepared.

devant chaque chambre du Parlement.

Action plan made public

(6) After the action plan is tabled, the Minister must make it public.

Publication

(6) Après le dépôt, le ministre rend public le plan d'action.

Report to Parliament

Rapport au Parlement

Annual report

7 (1) Within 90 days after the end of each fiscal year, the Minister must, in consultation and cooperation with Indigenous peoples, prepare a report for the previous fiscal year on the measures taken under section 5 and the preparation and implementation of the action plan referred to in section 6.

Rapport annuel

7 (1) Dans les quatre-vingt-dix jours suivant la fin de chaque exercice, le ministre prépare, en consultation et en collaboration avec les peuples autochtones, un rapport sur l'exercice précédent faisant état des mesures prises en application de l'article 5, ainsi que de l'élaboration et de la mise en œuvre du plan d'action prévu à l'article 6.

Tabling in Parliament

(2) The Minister must cause the report to be tabled in each House of Parliament on any of the first 15 days on which that House is sitting after the report is completed.

Dépôt au Parlement

(2) Le ministre fait déposer le rapport devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant la date de sa confection.

Referral to committee

(3) The report stands permanently referred to the committee of each House of Parliament that is designated or established to review matters relating to Indigenous peoples.

Comités saisis d'office

(3) Le comité de chaque chambre du Parlement désigné ou constitué pour étudier les questions relatives aux peuples autochtones est saisi d'office du rapport.

Report made public

(4) After the report is tabled, the Minister must make it public.

Publication

(4) Après le dépôt, le ministre rend public le rapport.

[9] Subsection 2(2) of the *UNDA*, which was repealed in 2024, had stated:

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(2) This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.	**(2)** La présente loi maintient les droits des peuples autochtones reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*; elle n'y porte pas atteinte.

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[10] When this subsection was repealed, the following section was added to the *Interpretation Act*, R.S.C. 1985, c. I-21, by S.C. 2024, c. 30:

8.3 (1) Every enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.	**8.3 (1)** Tout texte maintient les droits — ancestraux ou issus de traités — des peuples autochtones reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*; il n'y porte pas atteinte.
(2) For the purposes of subsection (1), ***Indigenous peoples*** has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.	**(2)** Au paragraphe (1), ***peuples autochtones*** s'entend au sens de *peuples autochtones du Canada*, au paragraphe 35(2) de la *Loi constitutionnelle de 1982*.

II. Background

[11] CNL operates the Site and is the proponent of the NSDF. The Site is owned by Atomic Energy of Canada Limited (AECL), a federal Crown corporation. CNL is engaged by AECL to manage its sites, nuclear activities, and decommissioning programs. CNL also manages AECL's nuclear waste responsibilities.

[12] The Site covers approximately 3,870 hectares bordering the Ottawa River and includes nuclear facilities, waste management areas, radioisotope laboratories and support facilities. The

Site was expropriated in 1944. Access to the Site has been restricted since the land was expropriated.

[13] Radioactive waste has been generated at the Site for over 75 years. The vast majority of the radioactive waste at the Site is classified as LLW. Although LLW contains low amounts of long-lived radionuclides, it still requires isolation and containment for periods of up to a few hundred years. The current LLW storage practices at the Site are not effective in preventing the long-term migration of contaminants and are inconsistent with modern waste management principles.

[14] As a result, CNL is proposing to construct a new NSDF on the Site that would provide a long-term modernized disposal solution for up to 1,000,000 cubic metres of solid LLW. CNL applied to the Commission for approval to amend its Nuclear Research and Test Establishment Operating Licence to allow it to construct the NSDF.

[15] Kebaowek is one of 11 recognized Algonquin Anishinabeg nations that together comprise the broader Algonquin nation. It is located on Lake Kipawa and is one of 9 Algonquin communities in Québec. Kebaowek has approximately 1,100 members, of which roughly 500 live off reserve in Ontario.

[16] In paragraph 15 of her reasons, the Federal Court Judge noted that “Kebaowek’s reserve and asserted title territory are ‘northwest and upstream of the [Canadian Nuclear] Site’”. As well, in paragraph 165, the Federal Court Judge noted that “[t]he claimed title area does not include

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the Site, which is located south of the town of Deep River; however, [Kebaowek] noted that the proposed NSDF is adjacent to their Title Claim area and within their broader traditional territory", which the Federal Court Judge noted includes lands in Ontario and Québec.

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III. Decision of the Commission

[17] The Commission approved CNL's application to amend its licence to construct the NSDF. The Commission, in its Record of Decision dated January 8, 2024, summarized its conclusions in paragraph 564:

> 564. Based on its consideration of the information on the record for this application, the Commission concludes that:
>
> - the factors described in paragraphs 19(1)(a) to 19(1)(h) of CEAA 2012 [the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52], as determined in the Commission's March 2017 decision on the scope of the EA [Environmental Assessment] were considered for the NSDF Project
>
> - the NSDF Project is not likely to cause significant adverse environmental effects as described in subsections 5(1) and 5(2) of CEAA 2012, provided that all proposed mitigation measures are implemented
>
> - the duty to consult, and where applicable, accommodate, has been adequately discharged with respect to established or potential Aboriginal and/or treaty rights in relation to both the EA and licensing decisions
>
> - CNL is qualified to carry on the activities that the amended licence would authorize
>
> - in carrying on that activity, CNL will make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed

[18] With respect to the duty to consult, the Commission, in paragraph 325, identified the Indigenous Nations and communities that had a potential interest in or could be impacted by the proposed NSDF project:

> 325. CNSC staff provided the Commission with information about its engagement activities with the Indigenous Nations and communities that it identified as having a potential interest in, or could potentially be impacted by, the proposed NSDF Project. In CMD 22-H7, CNSC staff identified the following Indigenous Nations and communities due to the proximity of their communities, treaty areas, and/or traditional territories to the proposed NSDF Project's location, or due to previously-expressed interest in being kept informed:
>
> - Anishinabek Nation
> - Algonquin Anishinabeg Nation Tribal Council
> - Algonquins of Ontario (AOO)
> - Algonquins of Pikwakanagan First Nation (AOPFN)
> - Algonquin Nation Secretariat:
>   - Wolf Lake First Nation (WLFN)
>   - Timiskaming First Nation
>   - Mitchikanibikok Inik, Algonquins of Barriere Lake (ABL)
> - Kebaowek First Nation (KFN)
> - Kitigan Zibi Anishinabeg (KZA)
> - Métis Nation of Ontario (MNO)
> - Williams Treaties First Nations:
>   - Alderville First Nation
>   - Chippewas of Beausoleil First Nation

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- Chippewas of Georgina Island First Nation
- Chippewas of Rama First Nation
- Curve Lake First Nation (CLFN)
- Hiawatha First Nation
- Mississaugas of Scugog Island First Nation

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[19] The Commission noted that a number of Indigenous Nations and communities made submissions on the impact of UNDRIP in relation to the Commission's role in approving the project. The Commission concluded that it was not empowered to determine how to implement UNDRIP and therefore it relied on the existing law related to the duty to consult:

> 432. A number of Indigenous Nations and communities have invoked the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) and *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in the context of the duty to consult and the authorization of the project. 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. This decision is therefore rooted in the law on the duty to consult as articulated in jurisprudence to date, and the legal parameters for its decision making under CEAA 2012 [the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52] and the NSCA [the *Nuclear Safety and Control Act*, S.C. 1997, c. 9].

IV. Decision of the Federal Court

[20] Kebaowek brought an application for judicial review of the decision of the Commission on the basis that, *inter alia*, the Commission failed to consider and apply UNDRIP in assessing

whether the duty to consult and accommodate was satisfied. The Federal Court Judge set out the issues in paragraph 42 of her reasons:

> [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?

[21] The Federal Court Judge found that the standard of review for issues B and C was correctness and for issue D was reasonableness.

[22] The Federal Court Judge found, in paragraph 76 of her reasons that, although "[t]he UNDRIP does not create new law or statutory obligations", it is nonetheless "an interpretive lens to be applied to determine if the Crown has fulfilled its obligations prescribed at law". In paragraph 80, she stated that "the UNDRIP was incorporated into Canada's positive legal framework on June 21, 2021, through the *UNDA*". She also found, in paragraph 81, that the Commission was required "to actively consider how the UNDRIP may impact the interpretation of Canadian laws, including the fulfillment of section 35 constitutional obligations".

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[23] The Federal Court Judge concluded, in paragraph 86, that "[t]he 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". The Federal Court Judge, in paragraph 85, referred to conformity with "international agreements that Canada is a part of, including the UNDRIP".

[24] The Federal Court Judge referred to Article 29(2) of UNDRIP and noted, in paragraph 130, that "[t]he 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".

[25] In paragraphs 133 and 134, the Federal Court Judge found that "[t]he 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" and that "[t]he failure to take this important context into account was an error of law".

[26] With respect to the issue of whether the Commission had erred in determining that the duty to consult had been fulfilled, the Federal Court Judge concluded that the Commission had erred by not considering UNDRIP in assessing whether the duty to consult had been satisfied:

> [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

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> 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.

[27] Since the only reason cited for finding an error in the determination of whether the duty to consult had been satisfied was the failure to consider UNDRIP, the logical conclusion is that but for the failure to consider UNDRIP, the Commission did not err in finding that the duty to consult had been satisfied.

[28] The Federal Court Judge also stated in paragraph 212 that:

> [212] The Commission did not consider the discharge of the DTCA [duty to consult and accommodate] 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.

[29] The Federal Court Judge allowed the application for judicial review, in part, and granted the remedy set out in paragraph 2 above. Costs were also awarded to Kebaowek.

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V. Decision of the BCCA in *Gitxaala*

[30] Following the hearing of this appeal, the British Columbia Court of Appeal released its decision in *Gitxaala*. The parties in the appeal before this Court requested and were granted leave to make further written submissions related to *Gitxaala*.

[31] In *Gitxaala*, the Court addressed the interpretation of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (the *Declaration Act*). The *Declaration Act* was adopted in British Columbia in relation to the laws of British Columbia, prior to the adoption of the *UNDA*. The *Declaration Act* and the *UNDA* are substantially similar. The issue in *Gitxaala* was, on the one hand, an alleged inconsistency between the rights recognized in the *Declaration Act* and UNDRIP and, on the other hand, the operation of the provincial *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, regime. The claims of the petitioners and the decision of the Chambers Judge are summarized in paragraphs 5 and 6:

> [5] The appellant First Nations assert Aboriginal and Indigenous rights in and title to certain territories in British Columbia. Following the grant of mineral claims in those territories, they brought petitions below challenging the mineral tenure system then operated under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292. The appellants contended that the operation of an automated online registry permitting "free miners" to register claims to mineral rights on Crown land prior to consultation with affected First Nations (the "Mineral Claims Regime") was inconsistent with the Crown's duties under s. 35 of the *Constitution Act, 1982* ["*Constitution Act*"], the honour of the Crown, s. 3 of the *Declaration Act*, and their rights recognized in *UNDRIP* and the *Declaration Act*. Together with other relief, they sought declarations with respect to the alleged inconsistencies.
>
> [6] The chambers judge accepted that the Crown's s. 35 duty to consult was triggered by the grant of mineral claims based on the test established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]. He held that the absence of a system for pre-registration consultation breached that duty to consult. As a result, the judge granted related declarations, but he suspended them

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to allow for the design and implementation of a system providing for consultation prior to issuance of mineral claims. However, he concluded that, while the *Declaration Act* contemplates a forward-looking process of consultation and cooperation to address the objectives of *UNDRIP*, it does not "implement" *UNDRIP* into British Columbia law, and he stated that *UNDRIP* "remains a non-binding international instrument". He also concluded that s. 3 of the *Declaration Act* "does not create justiciable rights"; therefore, he declined to adjudicate the question of whether the Mineral Claims Regime was consistent with *UNDRIP*. In the result, he dismissed the appellants' claims for related declaratory relief, from which orders they appeal.

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[32] The British Columbia Court of Appeal elaborated on the petitions in paragraphs 14 to 17:

[14] Gitxaala and Ehattesaht brought similar, though not identical, challenges to the operation of the Mineral Claims Regime, or, alternatively, the validity of the underlying legislation. Gitxaala filed their petition in October 2021. Ehattesaht filed their petition in June 2022.

[15] In their Further Amended Petition, Gitxaala sought declarations in relation to the duty to consult, the honour of the Crown, and the constitutional validity of s. 4 of the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004, together with orders quashing specified mineral claims and injunctive relief in connection with the operation of the Mineral Claims Regime. Gitxaala also sought "for the purposes of, or pursuant to, section 3 of the [*Declaration Act*]", declarations that the Mineral Claims Regime's operation "is not consistent" with *UNDRIP*, and the Crown "has a statutory duty to consult and cooperate with Gitxaala concerning measures necessary to ensure the laws of British Columbia, as they relate to mineral titles within Title Lands, are consistent with the Declaration".

[16] In their Further Amended Petition, Ehattesaht similarly sought declarations in relation to the duty to consult, the honour of the Crown, the validity and applicability of aspects of the statutory scheme, orders quashing specified mineral claims, and injunctive relief. As to *UNDRIP* and the *Declaration Act*, Ehattesaht sought declarations that the operation of the Mineral Claims Regime is inapplicable to the extent it operates without consultation or consent in a manner contrary to "the indigenous rights of Ehattesaht and/or First Nations recognized in UNDRIP and [the *Declaration Act*]".

[17] Both petitioners described the statutory basis for the Mineral Claims Regime, the way in which it operated, and its alleged adverse impacts on their rights and title. Both pleaded that the Crown had failed to fulfil its duty to consult prior to the grant of mineral claims, and both relied on common law precedents

> and principles relating to the honour of the Crown and the duty to consult, the *Interpretation Act*, R.S.B.C. 1996, c. 238, the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, the *Declaration Act*, and *UNDRIP*.

[33] The judgment that was ultimately issued by the British Columbia Court of Appeal was a single declaration related to the inconsistency between the mineral claims system and UNDRIP: "the CGC's [Chief Gold Commissioner of British Columbia's] conduct in establishing an online system allowing for automatic registration of mineral claims without requiring prior consultation and cooperation of affected Indigenous peoples is inconsistent with article 32(2) of *UNDRIP*" (paragraph 200 of the reasons).

[34] In his dissent, Justice Riley differed on the role that the Court should play:

> [201] I agree with my colleague Justice Dickson that the judge erred in holding that the *Declaration Act* does not implement *UNDRIP* into British Columbia law. The judge was in error in concluding that, despite the Legislature's passage of the *Declaration Act* into law, *UNDRIP* remains a non-binding international instrument. I concur with my colleague's conclusion that the *Declaration Act* incorporates *UNDRIP* into the positive law of British Columbia, with immediate legal effect. However, I part company with her as to the nature of the *Declaration Act*'s legal effect, and the role that courts can and should play in achieving its aims.
>
> …
>
> [250] I conclude that the question of inconsistency between *UNDRIP* and specific British Columbia laws at any fixed point in time is not a justiciable matter. This is a function of the Legislature's intent in enacting the *Declaration Act* as a framework for legislative reconciliation, which is a form of law reform within the domain of the executive and legislative branches.
>
> …

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VI. Issue and Standard of Review

[35] This is an appeal from a decision of the Federal Court on an application for judicial review of a decision of the Commission. As noted by the Supreme Court in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at paragraph 10, the question of whether the Federal Court Judge chose and properly applied the appropriate standard of review is reviewed on a correctness standard and "the appellate court performs a *de novo* review of the administrative decision".

[36] While a number of issues were raised in the judicial review application before the Federal Court, the sole issue in this appeal is whether the Commission erred in finding that "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" (paragraph 432 of the decision of the Commission, cited in paragraph 19 above). In paragraph 49 of her reasons, the Federal Court Judge described the issue as the Court considering "if the Commission has the jurisdiction to implement the UNDRIP".

[37] In my view, the central issue in this appeal is the interpretation of the *UNDA* and whether the various articles of UNDRIP (and, in particular, Article 29(2)) have been implemented or the Commission had the authority to implement these provisions. The interpretation of the *UNDA* is a general question of law of central importance to the legal system as a whole and, therefore, the standard of review is correctness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraphs 17, 53 and 59).

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VII. Analysis

[38] In its memorandum, Kebaowek submitted that:

> 46. This Court should therefore focus on whether the Commission was required to consider the impact, if any, of the *UNDRIP Act* and the UNDRIP in its decision-making both in respect of the assessment of the duty to consult *and* in respect of its decision under s. 24 of the *Nuclear Safety and Control Act*. No party disputes that the Commission did not do so.
>
> …
>
> 72. As the Federal Court found, Article 29(2) and Article 32(2), read together with Article 46, have clearly altered the standard of conduct expected of Canada in carrying out consultation. Consultation processes must be oriented toward obtaining Indigenous Nations' free, prior, and informed consent – not simply offering the opportunity to be heard. Clearly this demands a more robust process which considers the Indigenous rights holders' perspective, nourishes trust between the Crown and Indigenous rights-holder, and which is directed toward achieving agreement (failing which, the Crown must be able to address the derogation standard set out under Article 46 of UNDRIP.)
>
> [Emphasis in original]

[39] Kebaowek, in its submissions in relation to *Gitxaala*, stated:

> 17. Further, Kebaowek has never submitted that UNDRIP has fundamentally altered the duty to consult, given the law is context-specific with the controlling question being what is required to uphold the honour of the Crown. Rather, Kebaowek has consistently advanced that UNDRIP is a relevant contextual factor informing the duty to consult analysis that the Commission *must* consider and apply.
>
> [Emphasis in original]

[40] It is not clear whether Kebaowek is submitting that UNDRIP has "clearly altered the standard of conduct expected of Canada in carrying out consultation" requiring a more robust

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consultation or that UNDRIP does not "fundamentally alter the duty to consult". In any event, in paragraphs 103 and 104 of its memorandum, Kebaowek acknowledges that any alteration of the duty to consult is dependent on the application of the *UNDA*:

> 103. … the application of the *UNDRIP Act* and the UNDRIP has the potential to change what the duty to consult requires, and thus what is "adequate" to discharge the duty to consult. Given the Commission incorrectly declined to answer the legal question of whether the *UNDRIP Act* and the UNDRIP apply to its decision-making, it is impossible to assess whether the consultation that occurred was "adequate", regardless of how "deep" Canadian Nuclear claims the consultation was.
>
> 104. Second, if the *UNDRIP Act* applied, the Commission had an obligation to direct its consultation efforts toward obtaining Kebaowek's consent (Article 32(2)).

[41] If UNDRIP does not alter the duty to consult or impose additional obligations on the Commission, there would be no need to consider whether the *UNDA* implements the articles of UNDRIP. The issue of whether the *UNDA* implements the articles of UNDRIP arises, in particular, in relation to Article 29(2) of UNDRIP which imposes an obligation on a state to "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) also imposes an obligation on a state to consult and cooperate with Indigenous peoples in order to obtain their free and informed consent prior to any project affecting their lands or territories and other resources. If these articles have been implemented by the *UNDA*, it would be necessary to determine what additional obligations may be imposed on the Commission.

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[42] There is nothing to indicate that the answer to the question of whether Article 29(2) has been implemented would be different from the answer to the question of whether Article 32(2) has been implemented. Either both articles have been implemented or neither article has been implemented. Since Article 29(2) refers specifically to the storage or disposal of hazardous materials and this article was identified by the Federal Court Judge as being the article within which the NSDF project clearly falls, these reasons will focus on whether this article has been implemented.

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[43] Since this is a *de novo* review of the decision of the Commission, in this appeal, the analysis will proceed as follows:

(a) a general overview of the duty to consult and accommodate, which the Commission determined had been satisfied;

(b) an interpretation of the *UNDA* to determine how it applies and, in particular, whether Article 29(2) has been implemented (and therefore would be engaged); and

(c) a determination of whether the Commission is the Government of Canada for the purposes of section 5 of the *UNDA*.

A. *Duty to Consult and Accommodate*

[44] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida Nation*), the Supreme Court stated that the duty to consult and accommodate is grounded in the honour of the Crown:

> [16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> …
>
> [26] Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> [27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

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[45] The content of the duty to consult and accommodate is variable:

> [39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.
>
> …
>
> [42] At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw* [*Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010], *supra,* at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.
>
> [43] 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": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. 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

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> 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.
>
> [45] 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.

[46] The duty to consult and accommodate also does not give rise to a veto right (*Haida Nation* at paragraph 48; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, at paragraph 59).

[47] In this appeal, as noted by the Federal Court Judge, while Kebaowek has an outstanding Aboriginal title claim, the Site (which includes the lands proposed for the NSDF) is not located within the claimed title area, but rather is adjacent to this area. The Site is within Kebaowek's broader traditional territory (paragraph 165 of the reasons of the Federal Court Judge). Therefore, there is no established title claim to the Site nor is there an outstanding title claim to the Site.

[48] The lands for the Site were expropriated in the 1940s and access to the area has been restricted since then. As noted by the Federal Court Judge:

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> [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* [*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43] 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.

[49] The Federal Court Judge, in paragraph 212 of her reasons, also implicitly found that the Commission's finding that the NSDF is not likely to cause significant adverse environmental effects was reasonable. Kebaowek, in this appeal, does not assert that the Commission erred in making this finding.

[50] This is an unusual case. The LLW is not presently being stored in a manner that complies with modern international standards (paragraph 25 of the reasons of the Federal Court Judge). As noted by CNL in its memorandum:

> 15. Previous LLW storage practices at [the Site], including burying LLW in sand trenches, were not effective in preventing the long-term migrations of contaminants and were inconsistent with modern waste management principles.

[51] Since the new proposed NSDF will house the existing LLW and newly generated LLW (paragraph 26 of the reasons of the Federal Court Judge), while proceeding with the NSDF will

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not cause significant adverse environmental impacts, not proceeding with the NSDF and continuing to store the LLW in the existing sand trenches may have adverse environmental impacts.

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[52] Given the lack of an Aboriginal title claim to the Site and the lack of any "new or novel adverse impacts that do not follow the original taking of the lands for the purposes of nuclear development from the 1940s" (paragraph 209 of the reasons of the Federal Court Judge), the duty to consult and accommodate would be at the low end of the spectrum as identified in *Haida Nation*.

B. *The Interpretation of the UNDA – Does it implement Article 29(2) of UNDRIP?*

[53] Article 29(2) of UNDRIP specifically addresses the storage or disposal of hazardous materials and provides that:

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.	**2.** Les États prennent des mesures efficaces pour veiller à ce qu'aucune matière dangereuse ne soit stockée ou déchargée sur les terres ou territoires des peuples autochtones sans leur consentement préalable, donné librement et en connaissance de cause.

[54] The Federal Court Judge found, in paragraph 130 of her reasons, that "[t]he proposed NSDF is a project that clearly falls within the scope of Article 29(2), thus triggering the UNDRIP FPIC standard". This finding is reiterated in paragraph 183 of her reasons. In paragraph

221, the Federal Court Judge finds that "Article 29(2) highlights that FPIC is required for the disposal of hazardous materials in the lands or territories of Indigenous peoples".

[55] These findings are predicated on interpreting the *UNDA* as implementing the various articles of UNDRIP and, in particular, Article 29(2).

[56] The *UNDA* is to be interpreted based on its text, context and purpose:

> [43] The modern principle requires a court to interpret statutory language "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *R. v. Downes*, 2023 SCC 6, at para. 24). Even so, a court need not address text, context, and purpose separately or in a formulaic way, since these elements are often closely related or interdependent (*Bell ExpressVu* [*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42], at para. 31; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 28).
>
> [*Piekut v. Canada (Minister of National Revenue)*, 2025 SCC 13]

[57] The issue is whether

(a) the *UNDA* has implemented the articles as set out in UNDRIP with the result that any such articles, which are not already part of the laws of Canada, are now part of the laws of Canada; or

(b) the *UNDA* sets out a procedure for the implementation of the articles that are not already part of the laws of Canada.

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[58] As noted by the British Columbia Court of Appeal in *Gitxaala*:

> [66] As a General Assembly resolution, *UNDRIP* does not create or impose new international legal rights or obligations, nor is it formally binding as a treaty. Rather, it is a statement of internationally recognized human rights and standards. Some of its articles overlap with existing rules of treaty, custom or general principles of law of broad application, expressed in specific relation to Indigenous peoples. For example, article 3 recognizes and affirms the inherent right of Indigenous peoples to self-determination, which the International Law Commission has identified as a peremptory norm of international law and which is enshrined in binding conventions such as the *International Covenant on Civil and Political Rights*, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 and the *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46. Other *UNDRIP* articles elaborate and extend existing international legal rights derived from convention or custom and, to varying degrees, still others are, in whole or in part, aspirational. In other words, *UNDRIP* aggregates, articulates and extends a range of internationally binding rights, obligations and general principles, together with internationally recognized minimum standards of achievement, aspirations and concerns: Gib van Ert, "The impression of harmony: Bill C-262 and the implementation of the UNDRIP in Canadian law" (27 November 2018) 2018 at 2-5; Naiomi Metallic, "Breathing Life into Our Living Tree and Strengthening Our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act" in Alpert et. al., eds., *Rewriting the Canadian Constitution* (forthcoming) at 7-9; Sylvanus Ghendazhi Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law" (2017) 6:2 Int'l. Hum. Rts. L. Rev. 242 at 251 ["The Legal Status of the United Nations Declaration"].

[59] There would be no need to implement into Canadian law any of the articles in UNDRIP that are already part of the laws of Canada. The issue is whether the articles that are inconsistent with existing Canadian laws have been implemented.

[60] As noted by the Supreme Court in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (*First Nations Families Act Reference*):

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> [4] While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take, "in consultation and cooperation with indigenous peoples, ... the appropriate measures, including legislative measures, to achieve the ends" of the Declaration (art. 38). Recognized by Parliament as "a universal international human rights instrument with application in Canadian law", the Declaration has been incorporated into the country's positive law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("*UNDRIP Act*"), s. 4(a). This statute recognizes that the Declaration "provides a framework for reconciliation" (preamble); s. 5 of the same statute requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take "all measures necessary to ensure that the laws of Canada are consistent with the Declaration". The statute's preamble expressly provides that the implementation of the Declaration in Canada "must include concrete measures to address injustices" facing, among others, Indigenous youth and children.

[61] While the Supreme Court stated that "the Declaration has been incorporated into the country's positive law" by the *UNDA*, the Supreme Court also noted that the preamble "recognizes that the Declaration 'provides a framework for reconciliation'" and that section 5 of the *UNDA* "requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take 'all measures necessary to ensure that the laws of Canada are consistent with the Declaration'". As well, the "preamble expressly provides that the implementation of the Declaration in Canada 'must include concrete measures to address injustices' facing, among others, Indigenous youth and children".

[62] The Supreme Court in *First Nations Families Act Reference* also noted:

> [15] In 2021, Parliament enacted the *UNDRIP Act*, s. 4(a) of which affirms the Declaration "as a universal international human rights instrument with application in Canadian law". It is therefore through this Act of Parliament that the Declaration is incorporated into the country's domestic positive law. In s. 4(b), the statute states that its purpose is also to "provide a framework for the Government of Canada's implementation of the Declaration". In s. 5, it provides that the "Government of Canada must, in consultation and cooperation with

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> Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration". Further, s. 6(2)(b) provides that the minister responsible for the statute must prepare and implement an action plan, which must include "measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration". More generally, in the preamble to this statute, Parliament emphasized the Government of Canada's commitment to "taking effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration". Parliament also referred in the preamble to the call for it to implement the UNDRIP made by the Truth and Reconciliation Commission in its calls to action and by the National Inquiry into Missing and Murdered Indigenous Women and Girls in its calls for justice.
>
> [16] The call for lawmakers to pass legislation affirming self-government for Indigenous peoples and facilitating the exercise of these rights has been echoed in other contexts. Internationally, for example, the importance of such measures has been repeatedly pointed out (see, e.g., UNDRIP, art. 38; United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, U.N. Doc. A/HRC/9/9, August 11, 2008; United Nations, Office of the High Commissioner for Human Rights, *Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya*, October 15, 2013 (online)).
>
> [17] Taking legislative measures of this kind has been described as being part of a process that some have termed "legislative reconciliation", that is, the enactment of legislation "to respect, promote, protect, and accommodate inherent rights through mechanisms or frameworks elaborated upon within the statute" (see N. S. W. Metallic, "Aboriginal Rights, Legislative Reconciliation, and Constitutionalism" (2023), 27:2 *Rev. Const. Stud.* 1, at p. 5). In other words, legislation of this kind does not purport to be the source of the rights in question, but rather proceeds on the premise that these rights exist. Similar initiatives have also been described as "recognition legislation", including in the *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at p. 314 (see also S. Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022), 100 *Can. Bar Rev.* 1, at pp. 20-21).
>
> [Emphasis added]

[63] Stating that "legislation of this kind does not purport to be the source of the rights in question, but rather proceeds on the premise that these rights exist" does not support a finding

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that the articles as set out in UNDRIP, to the extent that there is an inconsistency between such articles and the laws of Canada, have been implemented into Canadian law and that any inconsistency between such articles and Canadian law would be resolved by finding that UNDRIP will prevail.

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[64] The British Columbia Court of Appeal in *Gitxaala* also referred to the decision of the Supreme Court in *First Nations Families Act Reference* and noted:

> [132] It seems to me the Court viewed Parliament's enactment of the [*UNDA*] as a preliminary, but significant, step in the long-term process of implementing *UNDRIP* domestically. That step included express recognition that *UNDRIP* applies in Canadian law, legislative incorporation of *UNDRIP* into the country's positive law, and the imposition of a statutory duty to consult, cooperate, and take measures to align domestic laws with *UNDRIP*, together with related planning and reporting obligations. The Court also viewed the *First Nations Families Act* as another, more specific, step in the same process…

[65] The provisions of the preamble and the *UNDA* referenced by the Supreme Court in *First Nations Families Act Reference* are not consistent with finding that the articles of UNDRIP have now been incorporated into the laws of Canada but rather are consistent with finding that the Government of Canada is committed to working with Indigenous peoples to take measures to ensure that the laws of Canada are consistent with UNDRIP. These provisions contemplate future action, not an immediate implementation of the articles as set out in UNDRIP into Canadian law.

[66] Subsection 2(3) of the *UNDA* states that:

(3) Nothing in this Act is to be	**(3)** La présente loi n'a pas pour effet

construed as delaying the application of the Declaration in Canadian law.	de retarder l'application de la Déclaration en droit canadien.

[67] This subsection does not use the positive language that would be required to implement UNDRIP in Canadian law. Rather, it is to be applied in interpreting the other sections of the *UNDA*.

[68] Section 4 of the *UNDA* sets out two purposes:

4 The purposes of this Act are to	**4** La présente loi a pour objet :
(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and	**a)** de confirmer que la Déclaration constitue un instrument international universel en matière de droits de la personne qui trouve application en droit canadien;
(b) provide a framework for the Government of Canada's implementation of the Declaration.	**b)** d'encadrer la mise en œuvre de la Déclaration par le gouvernement du Canada.

[69] Stating in paragraph 4(*a*) of the *UNDA* that one of the purposes of the *UNDA* is to affirm UNDRIP as a "universal international human rights instrument with application in Canadian law" is not the same as implementing UNDRIP, as confirmed by paragraph (*b*) which provides that one of the purposes is to provide "a framework for the Government of Canada's implementation of the Declaration". There is no need to provide a framework for the implementation of UNDRIP if UNDRIP is implemented by the *UNDA*.

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[70] Sections 5, 6 and 7 of the *UNDA* set out obligations:

> (a) on the Government of Canada, in consultation and cooperation with Indigenous peoples, to take measures to resolve inconsistencies between UNDRIP and the laws of Canada;
>
> (b) on the Minister, in consultation and cooperation with Indigenous peoples and other federal ministers, to prepare and implement an action plan to achieve the objectives of UNDRIP; and
>
> (c) on the Minister, in consultation and cooperation with Indigenous peoples, to prepare an annual report to Parliament.

[71] None of these obligations are consistent with the *UNDA* implementing UNDRIP. Rather, these obligations are consistent with the *UNDA* providing a framework for the future implementation of UNDRIP.

[72] In addressing subsection 1(4) of the British Columbia *Declaration Act* (which is the provision that corresponds to subsection 2(3) of the *UNDA*), the British Columbia Court of Appeal in *Gitxaala* stated:

> [139] Section 1(4) of the *Declaration Act* also comes under the heading "Interpretation". It provides that nothing in the *Declaration Act* is to be construed as delaying the application of *UNDRIP* to the laws of British Columbia. The word "application" ordinarily means the way in which something is used, and "to apply" ordinarily means the act of using something by bringing it to bear or putting it upon something else with practical results: see generally, *Oxford English Dictionary* (online) sub verdo "application"; *Cambridge Dictionary* (online) sub verdo "application"; *Merriam-Webster Dictionary* (online) sub verdo

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> "application". With those definitions in mind and reading it in context, I understand s. 1(4) to recognize that *UNDRIP* aggregates various international rights, obligations, principles, standards and aspirations, and to clarify that nothing in the *Declaration Act* may be interpreted as delaying the extent to which any of them would otherwise affect British Columbia laws, either interpretively or as incorporated into statutory or common law. For example, ss. 3, 4 and 5 of the *Declaration Act* create three positive statutory obligations, namely, to align laws with *UNDRIP*, create an action plan, and produce an annual report. Fulfilling one of those obligations cannot justify delay in fulfilling another.

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[73] The British Columbia Court of Appeal referred to the aggregation of "various international rights, obligations, principles, standards and aspirations" in UNDRIP and stated that subsection 1(4) of the British Columbia *Declaration Act* "clarified" that nothing in that Act would be interpreted as delaying the extent to which any of the "various international rights, obligations, principles, standards and aspirations" in UNDRIP would "otherwise affect British Columbia laws". The reference to "otherwise affect" could indicate that the "effect" does not arise from the *Declaration Act* itself. The only examples cited for the application of subsection 1(4) of the *Declaration Act* are delays in any of three obligations arising under the British Columbia *Declaration Act*, which correspond to the three obligations imposed under the *UNDA*, and which are set out in paragraph 70 above. None of the examples cited for the application of subsection 1(4) of the *Declaration Act* support a finding that the various articles of UNDRIP were implemented by the *Declaration Act*.

[74] In adopting other conventions, the legislation will often include a provision that addresses any inconsistency between the convention and the laws of Canada. For example, the *Income Tax Conventions Implementation Act, 2001*, S.C. 2001, c. 30 implemented agreements, conventions and protocols concluded between Canada and certain countries. For the conventions between Canada and Slovenia, Ecuador, Venezuela, Peru, Senegal, and the Czech Republic, and the

agreement between Canada and the Slovak Republic, there is a similarly worded provision to resolve any inconsistency. For example, section 5 addresses inconsistencies between the convention for Slovenia and any other law:

5 (1) Subject to subsection (2), in the event of any inconsistency between the provisions of this Part or the Convention and the provisions of any other law, the provisions of this Part and the Convention prevail to the extent of the inconsistency.	**5 (1)** Sous réserve du paragraphe (2), les dispositions de la présente partie et de la Convention l'emportent sur les dispositions incompatibles de toute autre loi ou règle de droit.
(2) In the event of any inconsistency between the provisions of the Convention and the provisions of the *Income Tax Conventions Interpretation Act* [(R.S.C. 1985, c. I-4)], the provisions of that Act prevail to the extent of the inconsistency.	**(2)** Les dispositions de *la Loi sur l'interprétation des conventions en matière d'impôts sur le revenu* [(R.S.C., 1985, c. I-4)] l'emportent sur les dispositions incompatibles de la Convention.

[75] The *UNDA* does not include a similar provision. Rather, the *UNDA* provides that the Government of Canada is to take action to resolve an inconsistency between the provisions of UNDRIP and Canadian laws:

5 The Government of 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.	**5** Le gouvernement du Canada, en consultation et en collaboration avec les peuples autochtones, prend toutes les mesures nécessaires pour veiller à ce que les lois fédérales soient compatibles avec la Déclaration.

[76] In my view, this different wording for the resolution of inconsistencies is significant. The *UNDA* could have provided, as in other statutes adopting conventions, that in the event of any

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inconsistency between the laws of Canada and UNDRIP, the provisions of UNDRIP would prevail. However, since this is not the wording that was chosen for section 5 of the *UNDA*, it supports a finding that the provisions of UNDRIP do not prevail in the event of an inconsistency between the laws of Canada and UNDRIP, but rather an inconsistency will give rise to an obligation on the part of the Government of Canada to resolve the inconsistency in consultation and cooperation with Indigenous peoples.

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[77] The issue of an inconsistency between UNDRIP and domestic law was before the British Columbia Court of Appeal in *Gitxaala*. In addressing the issue, the Court was focused on section 8.1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which was added to that Act in 2021:

> 8.1(1) In this section:
>
> "Declaration" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "Indigenous peoples" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "regulation" has the same meaning as in the *Regulations Act*.
>
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

[78] There is no provision of the federal *Interpretation Act* that is equivalent to subsection 8.1(3) of the B.C. *Interpretation Act*. When the federal *Interpretation Act* was amended in 2024, only section 8.3, as set out in paragraph 10 above, was added. As a result, the discussion and the

conclusions of the British Columbia Court of Appeal related to subsection 8.1(3) of the B.C. *Interpretation Act* are not relevant in this appeal.

[79] However, in my view, the conclusion of the British Columbia Court of Appeal on the effect of section 3 of the *Declaration Act* in relation to an inconsistency between the laws of British Columbia and UNDRIP is relevant. The *Declaration Act* is substantially similar to the *UNDA*. Section 3 of the *Declaration Act* addresses inconsistencies between the laws of British Columbia and UNDRIP:

> 3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

[80] In paragraph 149 of *Gitxaala*, the Court stated:

> [149] … It is the existence of inconsistency between a British Columbia law and one or more provisions of *UNDRIP* that triggers the Crown's obligation to take action, namely, to develop the measures necessary to resolve the inconsistency, in consultation and cooperation with Indigenous peoples, and to implement those measures (make them active or effective). …

[81] An inconsistency is not resolved by providing that the provisions of UNDRIP will prevail but rather it triggers the obligation to take action to resolve the inconsistency. This is consistent with my view that the *UNDA* does not implement the articles of UNDRIP immediately but rather provides for a process to eventually implement the articles.

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[82] As a result, in my view, the *UNDA* does not immediately implement the articles as set out in UNDRIP but rather provides a framework for the implementation of the various articles as set out in UNDRIP and sets out a process for the resolution of inconsistencies between UNDRIP and the laws of Canada, which may include the federal common law. In *Roberts v. Canada*, [1989] 1 S.C.R. 322, at pages 339-340, the Supreme Court found that the meaning of "law of Canada" for the purposes of section 101 of the *Constitution Act, 1867*, included federal common law and that the law of aboriginal title is federal common law. Whether the reference to the "laws of Canada" in the *UNDA* would also include the federal common law would need to be determined.

C. *Is the Commission the Government of Canada for the purposes of section 5 of the UNDA?*

[83] Even though the *UNDA* does not immediately implement all the articles of UNDRIP, section 5 of the *UNDA* stipulates that the "Government of 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". In this appeal, it is not necessary to find an all-inclusive definition of "Government of Canada". The only issue that is before us is whether the Commission, when it is acting in its administrative capacity to approve the construction of the NSDF, is included in the term "Government of Canada" as this expression is used in section 5 of the *UNDA* and, therefore, would be obligated to undertake the consultation process and to take the necessary measures as contemplated by this section. In my view, the reference to the "Government of Canada" in section 5 of the *UNDA* does not include the Commission, when it is so acting.

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[84] There is no definition of “government” in the *UNDA* or in the federal *Interpretation Act*.

[85] The term “Government of Canada” is used in several of the recitals of the *UNDA*:

Preamble	**Attendu :**
…	[…]
Whereas the Government of Canada rejects all forms of colonialism and is committed to advancing relations with Indigenous peoples that are based on good faith and on the principles of justice, democracy, equality, non-discrimination, good governance and respect for human rights;	que le gouvernement du Canada rejette toute forme de colonialisme et s’est engagé à promouvoir des relations avec les peuples autochtones qui soient fondées sur la bonne foi et sur les principes de justice, de démocratie, d’égalité, de non-discrimination, de bonne gouvernance et de respect des droits de la personne;
…	[…]
Whereas the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government;	que le gouvernement du Canada reconnaît que les relations avec les peuples autochtones doivent être fondées sur la reconnaissance et la mise en œuvre du droit inhérent à l’autodétermination, y compris le droit à l’autonomie gouvernementale;
Whereas the Government of Canada is committed to taking effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration;	que le gouvernement du Canada est déterminé à prendre des mesures efficaces — d’ordre législatif, politique et administratif, entre autres — à l’échelle nationale et internationale, en consultation et en collaboration avec les peuples autochtones, afin d’atteindre les objectifs de la Déclaration;
Whereas the Government of Canada is committed to exploring, in consultation and cooperation with Indigenous peoples, measures related to monitoring, oversight, recourse or remedy or other accountability	que le gouvernement du Canada s’engage à explorer, en consultation et en collaboration avec les peuples autochtones, des mesures de contrôle ou de surveillance, des voies de recours, des mesures de réparation ou

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measures that will contribute to the achievement of those objectives;	d'autres mesures de reddition de comptes qui contribueront à l'atteinte de ces objectifs;
…	[…]
Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;	que le gouvernement du Canada reconnaît que les gouvernements provinciaux et territoriaux et les administrations municipales ont chacun la faculté d'établir leurs propres façons de contribuer à la mise en œuvre de la Déclaration en adoptant, à cette fin, diverses mesures relevant de leur compétence;
Whereas the Government of Canada welcomes opportunities to work cooperatively with those governments, Indigenous peoples and other sectors of society towards achieving the objectives of the Declaration;	que le gouvernement du Canada est prêt à saisir les occasions de travailler en collaboration avec ces gouvernements et ces administrations, les peuples autochtones et d'autres acteurs de la société pour atteindre les objectifs de la Déclaration;
[Emphasis added]	[Non souligné dans l'original]

[86] It is not clear from the use of the term "Government of Canada" in the recitals whether the reference in section 5 of the *UNDA* would include the Commission. While there is a reference to the Government of Canada taking administrative measures, which could suggest that the Commission could take administrative measures, there is also a reference to the Government of Canada acknowledging that other levels of government (provincial, territorial and municipal) will have different approaches and to the Government of Canada working with these other levels of government, which would suggest that the Commission may not be included as the Government of Canada for the purpose of resolving inconsistencies between UNDRIP and the existing laws of Canada. The objects of the Commission, as set out below, are limited to issues related to nuclear energy and nuclear substances. It is far from clear what other levels of

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government would also deal with nuclear energy and nuclear substances or why the Commission would be tasked with working with provincial, territorial and municipal governments who may be dealing with the storage or disposal of other hazardous materials.

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[87] Kebaowek, in paragraph 77 of its memorandum, submits that:

> 77. The term "Government of Canada" is not synonymous with "the Parliament of Canada" and, more generally, is understood to mean the executive. Section 8 of the *Constitution Act, 1867* provides "[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen." Thereafter references to the "Government of Canada" in Canada's Constitution occur under Part III dealing with executive power rather than under Part IV, which addresses the legislative power of Parliament. Understood in accordance with its plain language, the Commission would clearly fall within the definition of the "Government of Canada" as: (1) it clearly exercises executive powers granted under the *Nuclear Safety and Control Act*, (2) it has been expressly constituted as a Crown agent, and (3) it falls with the broad understanding of the Crown adopted in the *Clyde River* case.

[88] Although Kebaowek states that the term "Government of Canada" appears in Part III of the *Constitution Act, 1867*, Kebaowek does not cite the particular references to this term. The term "Government of Canada" is used in four sections of Part III of the *Constitution Act, 1867*:

10 The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.	**10** Les dispositions de la présente loi relatives au gouverneur général s'étendent et s'appliquent au gouverneur général du Canada, ou à tout autre Chef Exécutif ou Administrateur pour le temps d'alors, administrant le gouvernement du Canada au nom de la Reine, quel que soit le titre sous lequel il puisse être désigné.
11 There shall be a Council to aid and advise in the Government of Canada,	**11** Il y aura, pour aider et aviser, dans l'administration du gouvernement du

to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

Canada, un conseil dénommé le Conseil Privé de la Reine pour le Canada; les personnes qui formeront partie de ce conseil seront, de temps à autre, choisies et mandées par le Gouverneur-Général et assermentées comme Conseillers Privés; les membres de ce conseil pourront, de temps à autre, être révoqués par le gouverneur-général.

12 All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

12 Tous les pouvoirs, attributions et fonctions qui, — par une loi du parlement de la Grande-Bretagne, ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, ou de la législature du Haut-Canada, du Bas-Canada, du Canada, de la Nouvelle-Écosse ou du Nouveau-Brunswick, lors de l'union, — sont conférés aux gouverneurs ou lieutenants-gouverneurs respectifs de ces provinces ou peuvent être par eux exercés, de l'avis ou de l'avis et du consentement des conseils exécutifs de ces provinces, ou avec la coopération de ces conseils, ou d'aucun nombre de membres de ces conseils, ou par ces gouverneurs ou lieutenants-gouverneurs individuellement, seront, — en tant qu'ils continueront d'exister et qu'ils pourront être exercés, après l'union, relativement au gouvernement du Canada, — conférés au gouverneur-général et pourront être par lui exercés, de l'avis ou de l'avis et du consentement ou avec la coopération du Conseil Privé de la Reine pour le Canada ou d'aucun de ses membres, ou par le gouverneur-général individuellement, selon le cas; mais ils pourront, néanmoins (sauf ceux existant en vertu de lois de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne

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	et d'Irlande), être révoqués ou modifiés par le parlement du Canada.
…	[…]
16 Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.	**16** Jusqu'à ce qu'il plaise à la Reine d'en ordonner autrement, Ottawa sera le siège du gouvernement du Canada.
[Emphasis added]	[Non souligné dans l'original]

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[89] None of these uses of the term "Government of Canada" would necessarily lead to a conclusion that the reference to the "Government of Canada" in section 5 of the *UNDA* would include the Commission.

[90] Kebaowek also states that the Commission "clearly exercises executive powers granted under the *Nuclear Safety and Control Act*". Kebaowek, however, does not identify what executive powers are granted to the Commission. It does not necessarily follow that even though the Commission may exercise executive powers, the Commission would be the "Government of Canada" for the purposes of section 5 of the *UNDA* in deciding whether to approve the NSDF project.

[91] Kebaowek also refers to the designation of the Commission as an agent of the Crown (subsection 8(2) of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (the *NSCA*)) as support for its argument that the Commission is the Government of Canada for the purposes of section 5 of the *UNDA*:

8 (1) There is hereby established a body corporate to be known as the	**8 (1**) Est constituée une personne morale appelée la Commission

Canadian Nuclear Safety Commission.	canadienne de sûreté nucléaire.
(2) The Commission is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty.	**(2)** La Commission est mandataire de Sa Majesté et ne peut exercer ses attributions qu'à ce titre.

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[92] The Commission is only designated as an agent of the Crown "for all its purposes". There is nothing to indicate that the Commission's purposes would include undertaking the specific consultation and cooperation process contemplated by section 5 of the *UNDA* and the taking of the necessary measures as set out in this section.

[93] The objects of the Commission are set out in section 9 of the *NSCA*:

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 :
(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,	**(i)** le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,
(ii) prevent unreasonable risk to national security associated with that development, production, possession or use,	**(ii)** le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,

and	
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and	**(iii)** ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;
(b) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (a).	**b)** d'informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et pour l'environnement, des activités mentionnées à l'alinéa a).

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[94] The objects of the Commission are limited to issues related to nuclear energy and nuclear substances. The Commission's objects do not include the regulation of other materials that would be hazardous materials.

[95] Article 29(2) of UNDRIP refers to "hazardous materials", which is not defined in UNDRIP. Presumably nuclear waste would not be the only hazardous material for the purposes of Article 29(2) of UNDRIP. Since the Commission's objects are limited to nuclear substances, this would suggest that Parliament in adopting the *UNDA* did not intend that the Commission would be tasked with the obligation to consult with Indigenous peoples generally and to take measures to reconcile any inconsistency between Article 29(2) and the laws of Canada with respect to the storage or disposal of "hazardous materials", in deciding whether to approve the NSDF project.

[96] The objects of the Commission do not include a broad objective of consultation with Indigenous peoples and the taking of measures to reconcile an inconsistency between the laws of Canada and UNDRIP that could impact, not only the storage or disposal of nuclear waste, but also the storage or disposal of any other material that will be included in the term "hazardous material" as it appears in Article 29. The only issue before the Commission was whether the CNL's licence should be amended to authorize the construction of the proposed NSDF project at the Site, which required consultation and accommodation with a limited number of Indigenous Nations and communities. Section 5 of the *UNDA* contemplates a general consultation process with Indigenous peoples and taking measures to ensure that the laws of Canada are consistent with UNDRIP.

[97] Kebaowek also refers to "the broad understanding of the Crown adopted in the *Clyde River* case" at paragraph 29. In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, the Supreme Court stated:

> [29] By this understanding, the NEB [National Energy Board] is not, strictly speaking, 'the Crown'. Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA* [*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7] however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* [*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43] to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames* [*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015

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> FCA 222], "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

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[98] The references to the action of the NEB constituting Crown action do not assist in determining whether the Commission, in deciding whether to approve the NSDF project, is the "Government of Canada" for the purposes of section 5 of the *UNDA*. Even though the action of the Commission in approving the NSDF project would be Crown action, it does not necessarily follow that the Commission is the "Government of Canada" for the purposes of section 5 of the *UNDA*.

[99] The term "Government of Canada" appears in several other federal statutes, including:

- subsections 59(2), (3), and (4), sections 60 and 70, subsections 73(1), (2), 74(1), and (2), section 75, and subsections 77(1), 78(1), and (2) of the *Northwest Territories Act*, S.C. 2014, c. 2, s. 2;

- subsection 2.1(1), section 2.3, subsection 3(1), section 8, subsections 10(1), (2), and 16(3), section 16.1, subsections 25(3), 39(1), (2), 41(1), (2), (3), (4), and 42(1), section 42.1, and subsections 43(1), 44.1(2), 45.1(1), and 46(1) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.);

- sections 2 and 3 of the *Federal Framework for Suicide Prevention Act*, S.C. 2012, c. 30;

- subsections 2(1), (1.1), 3(1), 6(1), 44(3.1), 75(2), 207(1), 208(2), 209(3), and 316(1) of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33;

- subsection 3(1), sections 5 and 6, subsections 10(1) and 14(1), section 15 and 16, subsection 19(2), and section 20 of the *Department of Public Works and Government Services Act*, S.C. 1996, c. 16;

- subsections 2(1), 3.9(1), 7(1), (2), 7.1(1), and 7.4(2), section 7.5, subsections 8.3(1), (2), 8.8(1), (2), 8.9(1), and (2), and sections 28 and 42 of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8;

- section 2 and subsections 3(1) and (2) of the *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.); and

- sections 14 and 40.1, subsection 42(4), sections 42.5 and 145, and subsections 159(2) and (3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11.

[100] A review of the term “Government of Canada” as it appears in these various statutes does not reveal a single common meaning to the term. Rather, the meaning to be assigned to “Government of Canada” is to be determined based on the context in which it is used in a particular statute.

[101] In my view, given the narrow scope of the objects of the Commission and the broad consultation process envisioned by section 5 of the *UNDA*, the reference to the Government of

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Canada in section 5 of the *UNDA* would not include the Commission in deciding whether to approve the construction of the NSDF.

[102] At the hearing of this appeal, Kebaowek also referred to the obligation on the Commission "to implement international obligations to which Canada has agreed" in subsection 24(4) of the *NSCA*:

(4) No licence shall be issued, renewed, amended or replaced — and no authorization to transfer one given — unless, in the opinion of the Commission, the applicant or, in the case of an application for an authorization to transfer the licence, the transferee	**(4)** La Commission ne délivre, ne renouvelle, ne modifie ou ne remplace une licence ou un permis ou n'en autorise le transfert que si elle est d'avis que l'auteur de la demande ou, s'il s'agit d'une demande d'autorisation de transfert, le cessionnaire, à la fois :
(a) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and	**a)** est compétent pour exercer les activités visées par la licence ou le permis;
(b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.	**b)** prendra, dans le cadre de ces activités, les mesures voulues pour préserver la santé et la sécurité des personnes, pour protéger l'environnement, pour maintenir la sécurité nationale et pour respecter les obligations internationales que le Canada a assumées.
[Emphasis added]	[Non souligné dans l'original]

[103] As noted by the Supreme Court in *First Nations Families Act Reference*, at paragraph 4, UNDRIP "is not binding as a treaty in Canada" and therefore, as a UN general assembly resolution, would not be an international obligation to which Canada has agreed. Furthermore,

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since the *UNDA* did not immediately implement the articles of UNDRIP into Canadian law and since the Commission is not the Government of Canada for the purposes of resolving any inconsistency between UNDRIP and the laws of Canada, there is no obligation on the Commission to implement UNDRIP in the course of deciding whether to approve the construction of the NSDF.

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D. *Additional Issues Concerning the Interpretation of Article 29(2) of UNDRIP*

[104] The Federal Court Judge found, at paragraph 130, that "[t]he proposed NSDF is a project that clearly falls within the scope of Article 29(2)" and again, at paragraph 183, that "[i]t 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".

[105] Although the Federal Court Judge, in reference to the FPIC standard in Article 29, states that the standard is not a veto, she also states in paragraph 221 that "Article 29(2) highlights that FPIC is required for the disposal of hazardous materials in the lands or territories of Indigenous peoples" (emphasis added). This requirement to obtain FPIC is not included in the Judgment that was rendered but it does raise the question of whether Article 29(2) is, in effect, a veto right.

[106] The wording of Article 29(2) of UNDRIP is different from the wording of Article 32(2) of UNDRIP:

Article 32	**Article 29**
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.	**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.

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[107] Article 32(2) would impose an obligation on states to "consult and cooperate in good faith with the indigenous peoples concerned … in order to obtain their free and informed consent …" whereas Article 29(2) imposes an obligation on states to "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". There should be no dispute that, even in the absence of Article 29(2), no person can dispose of or store hazardous material on another person's property without the consent of the property owner. The issue that would need to be addressed in relation to the NSDF project is whether the Site is located within "the lands or territories of" Kebaowek, as that expression is used in Article 29(2). This issue was not addressed by either party or the Federal Court Judge.

[108] The implication of the Federal Court Judge's finding in paragraph 130 of her reasons that "[t]he proposed NSDF is a project that clearly falls within the scope of Article 29(2)" is that the Site is part of "the lands or territories" of Kebaowek, as that expression is used in Article 29(2). Since the Federal Court Judge made this finding without addressing the wording of Article 29(2), a few comments on the wording of this article are warranted.

[109] Articles 26, 27 and 28 of UNDRIP also address issues related to the lands, territories and resources of Indigenous peoples:

Article 26	**Article 26**
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.	**1.** Les peuples autochtones ont le droit aux terres, territoires et ressources qu'ils possèdent et occupent traditionnellement ou qu'ils ont utilisés ou acquis.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.	**2.** Les peuples autochtones ont le droit de posséder, d'utiliser, de mettre en valeur et de contrôler les terres, territoires et ressources qu'ils possèdent parce qu'ils leur appartiennent ou qu'ils les occupent ou les utilisent traditionnellement, ainsi que ceux qu'ils ont acquis.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.	**3.** Les États accordent reconnaissance et protection juridiques à ces terres, territoires et ressources. Cette reconnaissance se fait en respectant dûment les coutumes, traditions et régimes fonciers des peuples autochtones concernés.
Article 27	**Article 27**
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of	Les États mettront en place et appliqueront, en concertation avec les peuples autochtones concernés, un processus équitable, indépendant, impartial, ouvert et transparent prenant dûment en compte les lois, traditions, coutumes et régimes fonciers des peuples autochtones, afin de reconnaître les droits des

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indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.	peuples autochtones en ce qui concerne leurs terres, territoires et ressources, y compris ceux qu'ils possèdent, occupent ou utilisent traditionnellement, et de statuer sur ces droits. Les peuples autochtones auront le droit de participer à ce processus.
Article 28	**Article 28**
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.	**1.** Les peuples autochtones ont droit à réparation, par le biais, notamment, de la restitution ou, lorsque cela n'est pas possible, d'une indemnisation juste, correcte et équitable pour les terres, territoires et ressources qu'ils possédaient traditionnellement ou occupaient ou utilisaient et qui ont été confisqués, pris, occupés, exploités ou dégradés sans leur consentement préalable, donné librement et en connaissance de cause.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.	**2.** Sauf si les peuples concernés en décident librement d'une autre façon, l'indemnisation se fait sous forme de terres, de territoires et de ressources équivalents par leur qualité, leur étendue et leur régime juridique, ou d'une indemnité pécuniaire ou de toute autre réparation appropriée.

[110] Article 26 sets out a right to "lands, territories and resources which [Indigenous peoples] have traditionally owned, occupied or otherwise used or acquired". Article 27 sets out an

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obligation to establish a process “to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used”. Article 28 sets out the right to compensation “for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”.

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[111] While each of Articles 26, 27 and 28 refer to lands and territories that were traditionally owned, used or occupied, Article 29(2) only refers to the lands or territories of Indigenous peoples.

[112] The Site was expropriated in the 1940s. As noted by the Federal Court Judge in paragraph 174 of her reasons:

> [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* [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010] 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.

[113] The Site was taken in the 1940s and has been damaged. Article 28 of UNDRIP sets out a right to redress “for the lands, territories and resources which [Indigenous peoples] have traditionally owned or otherwise occupied or used, and which have been confiscated, taken,

occupied, used or damaged without their free, prior and informed consent". Although Article 28 contemplates restitution, even if a claim under this Article could be established, since the Site has been used to store nuclear waste for over 70 years, restitution would not be possible. If a claim is established under this Article, it would lead to a right to compensation. Whether such a claim could be established is not, however, the issue in this appeal.

[114] The issue that would need to be addressed if Article 29(2) is implemented, is whether Indigenous peoples who traditionally occupied or used particular lands or territories that have been taken by a state would be entitled to both compensation for the taking of the lands and a continuing right to enforce Article 29(2) to prevent a state from storing hazardous materials on the same lands or territories. This would raise the issue of whether Article 29(2) would be engaged in the appeal that is before us in relation to the NSDF on the Site, even if Article 29(2) was implemented by the *UNDA*.

[115] Article 32(2) of UNDRIP also requires States to "consult and cooperate in good faith with the indigenous peoples concerned … in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories". The reference in this Article is also to the lands or territories without any reference to lands or territories that Indigenous peoples have traditionally owned, occupied or used. This would also raise an issue of whether the Site is part of the lands and territories of Kebaowek for the purposes of Article 32(2). If the lands or territories of Kebaowek, for the purposes of Article 32(2), do not include the Site, then it would be necessary to show that the NSDF would affect their lands or territories that are outside the Site in order to engage Article 32(2).

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VIII. Conclusion

[116] As a result, in my view, the Commission did not err in finding that it "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".

[117] I would, therefore, allow the appeal with costs and set aside the Judgment of the Federal Court. Since the only issue raised in the cross-appeal is whether the decision of the Commission should be struck, I would dismiss the cross-appeal without costs. Rendering the decision that the Federal Court should have made, I would dismiss the application for judicial review of the decision of the Commission with costs in the Federal Court.

"Wyman W. Webb"
J.A.

"I agree.
K. A. Siobhan Monaghan J.A."

"I agree.
Peter G. Pamel J.A."

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	CANADIAN NUCLEAR LABORATORIES LTD. v. KEBAOWEK FIRST NATION and ALGONQUINS OF PIKWAKANAGAN FIRST NATION, MINING ASSOCIATION OF CANADA, CANADIAN NUCLEAR ASSOCIATION and SAUGEEN OJIBWAY NATION
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CONCURRED IN BY:	MONAGHAN J.A. PAMEL J.A.
DATED:	OCTOBER 16, 2026

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