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Court File No. \_\_\_\_\_

**FEDERAL COURT**

EAGLE LAKE FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF NATURAL RESOURCES (THE HON. JONATHAN WILKINSON, M.P.), and THE NUCLEAR WASTE MANAGEMENT ORGANIZATION.

Respondents

APPLICATION UNDER S. 18.1 OF THE  
*FEDERAL COURTS ACT*, R.S.C. 1985, C. F-7

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

**IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.**

**Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office. IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

**Date: December 20, 2024**

**Issued by:**

**Address of local office:**

**ATTORNEY GENERAL OF CANADA &  
MINISTER OF NATURAL RESOURCES  
c/o Department of Justice Canada**

Suite 400 – 120 Adelaide Street West  
Toronto, ON M5H 1T1

**Telephone:** 416-973-0942

**Fax:** 416-954-8982

**Email:** [AGC\\_PGC\\_TORONTO.LEAD-DCECJ@JUSTICE.GC.CA](mailto:AGC_PGC_TORONTO.LEAD-DCECJ@JUSTICE.GC.CA)

**THE NUCLEAR WASTE MANAGEMENT ORGANIZATION  
c/o John A. Terry, Torys LLP**

79 Wellington St. W, #3300  
TORONTO, ON M5K 1N2

**Telephone:** 416-865-8245

**Email:** [jterry@torys.com](mailto:jterry@torys.com)

## PART 1: APPLICATION

This is an application for judicial review of the decision of the Nuclear Waste Management Organization (“**NWMO**”) selecting a site for its Deep Geological Repository (“**DGR**”) – where nuclear waste would be stored for millennia -- within Eagle Lake First Nation (“**ELFN**”) territory. NWMO refers to the site as the Wabigoon Lake Ojibway Nation-Ignace location (the “**Site**”). This application for judicial review also challenges the NWMO’s corresponding decision to not recognize ELFN as a “host community” for the Site, which would mean it has the right to approve or reject the Site for the DGR (collectively, the “**Decisions**”). Instead, NWMO rejected ELFN as a host community and not for any fair, justifiable or defensible reasons (which did not exist, given that the location of the Site is in ELFN Territory where it exercises rights, and near ELFN’s reserve) but because ELFN members had indicated some concerns with the DGR. NWMO flouted and precluded a procedurally and substantively fair process and outcome. ELFN challenges the procedurally unfair, bad faith, conduct of the NWMO in making the Decisions.

All references within this application to the NWMO also refer to the Minister of Natural Resources (the “Minister”) and the Government of Canada where required by law.

## PART 2: RELIEF SOUGHT

The Applicant ELFN seeks the following relief:

- a) Declaration that the Decisions and Impugned Conduct are unreasonable;
- b) Declaration that the Decisions and Impugned Conduct are contrary to the purpose and intent of the *Nuclear Fuel Waste Act*, S.C. 2002, c. 23 (“**NFWA**”) statutory regime and policy;
- c) Declaration that the Decisions and Impugned Conduct violate the rules of procedural fairness;
- d) Declaration that the Decisions and Impugned Conduct are contrary to the honour of the Crown and the duty to engage in good faith when consulting or dealing with a First Nation about a potential use of and threat to its Territory and rights, as NWMO had ostensibly been doing with ELFN, in contravention of section 35 of the *Constitution Act, 1982* (U.K.), 1982, c. 11 (the “**Constitution**”);

- e) Order in the nature of certiorari quashing the Decisions;
- f) Order in the nature of mandamus requiring NWMO or Canada to designate ELFN as a host community for the Site and to accord to it all the rights and privileges of a host community that have been accorded to WLON in respect of the Site;
- g) In the alternative to (f), an order that the NWMO must engage in good faith with ELFN to acquire its free, prior and informed consent to the Site prior to making any Decision in respect of the Site;
- h) Costs on a substantial indemnity basis; and
- i) Such other relief as counsel may advise and this Court may deem just.

The grounds for the application are as follows:

### **PART 3: GROUNDS FOR APPLICATION**

#### **I. INTRODUCTION:**

##### ***A. The Applicant, its territory, and its Aboriginal and Treaty Rights***

1. For thousands of years and continuing to the present day, ELFN and its members have lived and sustained themselves on ELFN's homeland territory, carrying out a distinctive way of life. This way of life is attached to and embedded in the land—with culture, identity, spirituality, social norms and economy (including hunting, trapping, fishing, and gathering) all based on a stewardship relationship with the land.
2. ELFN is a "band" under the *Indian Act*, R.S.C. 1985, c. 1-5 and constitutes an "Aboriginal people" within the meaning of section 35 of the Constitution. ELFN is also a signatory to Treaty #3, which encompasses a large part of what is now northwestern Ontario and a small part of eastern Manitoba, and a member of Grand Council Treaty #3 ("**GCT3**").
3. ELFN's territory extends approximately south of and including highway 11 (Atikokan), north past Lac Seul, Ontario, west to highway 72, and to the east, encompassing and extending beyond East English River Provincial Park and Turtle River-White Otter

Lake Provincial Park (“**ELFN Territory**”). ELFN has inherent rights to its Territory, as well as rights preserved under Treaty 3 and the Constitution.

4. ELFN’s reserve (Eagle Lake 27) is located about 17 kilometers southeast of Dryden and about 127 kilometers west of Kenora. ELFN has a registered membership of about 675 members, with approximately 362 members living on ELFN’s reserve and 313 living off-reserve. These members exercise rights throughout ELFN’s Territory.
5. In the past, ELFN and another First Nation—Wabigoon Lake Ojibway Nation (“**WLON**”) — were of one Nation, including prior to and at the time of the signing of Treaty 3 in 1873. Treaty 3 was signed by 24 Chiefs acting on behalf of approximately 4000 Anishinaabe. Chief Kah-kee-y-ash signed the treaty on behalf of what is now ELFN and WLON and requested 3 reserves for his people: two on Wabigoon Lake and one on Eagle Lake.
6. For this reason, ELFN and WLON share the same reserve number and for a time, were listed on the same payroll for receipt of annuities from the Crown. In 1932, however, the Eagle Lake band is believed to have become politically independent as the Band’s 1932 treaty annuity payroll was the first on which a separate Chief was specifically listed for ELFN. As such, since at least 1932, ELFN and WLON have been considered two separate bands, both by the Crown and otherwise.
7. Having formed, at one time, two parts of the same people, ELFN and WLON’s territories overlap. As two examples of the interrelationship between the two Nations, the harvesting areas of the two communities were not and have never been divided along clean lines, and there are innumerable familial relationships between members of ELFN and WLON, both historically and continuing to the present day.
8. ELFN has deep cultural, spiritual, social, and economic connections throughout ELFN Territory, regardless of whether any of that territory is shared or overlaps with WLON Territory.

### ***B. The Respondents***

9. The Minister is responsible for the administration of the NFWA.

10. The NFWA was created for the purpose of “providing a framework to enable the Governor in Council to make, from the proposals of the waste management organization, a decision on the management of nuclear fuel waste that is based on a comprehensive, integrated and economically sound approach for Canada.”<sup>1</sup>
11. NWMO is a corporation established under the NFWA for the purpose of proposing to the Government of Canada approaches for the management of nuclear fuel waste and tasked with implementing the approach selected pursuant to section 15 of the NFWA by the Governor in Council.<sup>2</sup> In 2007, the Governor in Council approved the NWMO’s recommended approach —the DGR—on the recommendation of the Minister. The design, implementation, and execution of the DGR approach was primarily delegated to the NWMO.
12. However, the NFWA also establishes the oversight that the Government of Canada and the Minister may exercise in regards to the long-term management of nuclear fuel waste in Canada. This oversight includes, among other things, monitoring all relevant NWMO activities; carrying out independent public consultations and auditing measures, as required; and assessing the need for consultations that may be necessary to meet the Crown’s duty to consult.
13. Moreover, NWMO and the Minister also signed a Memorandum of Understanding (“MOU”), dated January 7, 2016, which clarified the roles and responsibilities of the parties. This MOU makes clear that the NWMO is responsible for the long-term management of Canada’s used nuclear fuel, and though recognizing that the Crown is ultimately responsible for ensuring that the duty to consult and accommodate with Indigenous nations is fulfilled, the Crown expressly agreed to delegate to the NWMO certain procedural aspects of any such duty owed in relation to the NFWA, to the extent permitted by law.<sup>34</sup>

<sup>1</sup> *Nuclear Fuel Waste Act*, S.C. 2002, c. 23, s.3.

<sup>2</sup> NFWA, s.6(1).

<sup>3</sup> Memorandum of Understanding, Her Majesty the Queen in Right of Canada and Nuclear Waste Management Organization, online: <https://natural-resources.canada.ca/our-natural-resources/energy-sources-distribution/nuclear-energy-uranium/radioactive-waste/memorandum-understanding/7753>.

<sup>4</sup> The applicant recognizes that s.6(3) of the NFWA states that the NWMO is not an agent of the Crown, however in addition to the many provisions in the NWMA requiring the NWMO to carry out functions on behalf of the Crown,

### ***C. The Project and Decision***

14. The NWMO has, since 2010, been engaged in a process of selecting a site in Canada where used nuclear waste (spent nuclear fuel after its use in energy supply processes) could be stored deep in the earth until, it is hoped, it is no longer a danger to human or environmental health. This nuclear waste storage site is referred to as a Deep Geological Repository or DGR.
15. NWMO's and Canada's publicly-stated policy was that the DGR would not be sited in any location in Canada without the informed consent of the "host community".<sup>5</sup> That is, NWMO and Canada agreed and created the expectation that any "host community" would have the right to free, prior and informed consent, or conversely, a veto, in respect of the siting.
16. In or around November 2019, NWMO narrowed the selection of the site to two possible locations, one being on the Bruce Peninsula and the other being in northwestern Ontario near Revell Lake and in between the town of Ignace and the WLON Reserve. This latter site is also in ELFN Territory near its reserve.
17. On or about November 28, 2024, NWMO announced that the site it had selected for the DGR was the WLON-Ignace location (the "Site"). At the same time, NWMO verified that it had recognized two and only two host communities (WLON and the Town of Ignace) as both had agreed to continue to proceed with NWMO toward developing the DGR at the Site.

### ***D. ELFN's attempted engagement with NWMO***

#### ***i. General time and number of meetings***

18. ELFN and NWMO met at least 10 times between October 2017 and October 2024. These meetings took place in various locations, including at the ELFN reserve. Throughout these meetings and in between them, through correspondence, ELFN

the MOU makes clear that the parties expressly agreed that the NWMO would act on its behalf on matters related to the NWMA in certain respects, including regarding aspects of the Crown's duty to consult and accommodate with Indigenous nations.

<sup>5</sup> Guiding principles, Nuclear Waste Management Organization, online: <https://www.nwmo.ca/site-selection/how-it-was-developed/guiding-principles>.

made clear that it must be considered a host community with respect to the Site, or that NWMO must otherwise provide ELFN with the right of free, prior and informed consent.

***ii. Funding and agreements signed***

19. Dating back to at least late 2017, ELFN and NWMO were parties to multiple Learn More Agreements (“**LMA**”), which were continually renewed and extended. The LMAs were agreements developed by the NWMO to support learning and dialogue as part of the site selection process. The LMAs were also intended to provide First Nations, such as ELFN, with funding to, amongst other things, engage in consultation, undertake community engagement and undertake required research and studies in relation to the DGR.

20. The LMAs between NWMO and ELFN were renewed or extended multiple times between December 2017 and February 2022. Yet, at no point between 2017 and 2024 did the NWMO offer ELFN any type of agreement that would amount to a host community agreement or which would provide ELFN with the level of involvement in the Site decision commensurate to the level of engagement the Town of Ignace and WLON have received.

***iii. ELFN repeatedly advised NWMO that it must be recognized as a host community***

21. Beginning in or around 2017, ELFN has attempted to engage with NWMO and has clearly and repeatedly notified NWMO that the Site was in ELFN Territory. ELFN had indicated clearly and repeatedly that the proposed Site was within ELFN Territory, as shared with WLON, and that ELFN had rights and values in and connections to the proposed Site area, and that it was near its reserve. As such, ELFN should be recognized as a host community.

22. Since at least late 2019, NWMO has refused ELFN host community status, and done so without reason, justification, or willingness to engage about the issue. NWMO has not provided criteria that it considered in determining which communities would be host communities. NWMO has not accepted or responded to evidence or information

from ELFN that would substantiate and support that ELFN should be a host community. NWMO has just said “no” or said nothing.

23. As recently as October 2024, ELFN and NWMO met in Thunder Bay, where ELFN again advised NWMO that they must be considered a host community and that they had information and evidence to substantiate that assertion. NWMO advised that they would follow-up with ELFN to provide ELFN with a response to ELFN’s request to be made a host community and provide additional information about the project. Yet NWMO did not follow up or engage with ELFN at all. Instead, it made the announcement at the end of November that the Site had been selected.

### ***E. ELFN’s challenge***

24. ELFN thus challenges the Decisions. Specifically, ELFN challenges NWMO’s decision to select the Site in ELFN Territory while unjustifiably rejecting all requests from ELFN to be recognized as a host community or as a First Nation having rights of free, prior and informed consent with respect to the Site.

25. ELFN also challenges the NWMO’s conduct in making the Decisions. Throughout the decision-making process, NWMO refused to engage with ELFN in good faith, refused to provide criteria for its recognition of a host community, refused to provide notice or reasons for its rejection of ELFN as a host community that are justifiable, intelligible or transparent, and refused to inform ELFN of what evidence it could produce to substantiate its position that it should be a host community.

26. Rather, NWMO predetermined that ELFN would not be considered a host community for the DGR based on its assumption that ELFN would oppose the Site, such assumption itself not based on due process. Had ELFN been recognized as a host community, a deep engagement with NWMO would have ensued, followed by a community referendum which would have at that point indicated the community’s position. None of that occurred despite ELFN repeatedly calling for it, and as such, the community’s trust in NWMO eroded and concerns with the entire process arose. NWMO created these conditions. NWMO’s conduct amounts to bad faith, a refusal to act in a procedurally fair manner, in accordance with the legitimate expectations it

established, and in accordance with the honour of the Crown. Paragraphs 21 to 26 outline the “**Impugned Conduct**”.

## **II. GROUNDS FOR REVIEW:**

### ***A. NWMO’s failure to treat ELFN as a host community is inconsistent with the honour of the Crown, the Duty to Consult and Accommodate and the UNDRIP Act.***

27. The Site falls squarely in ELFN Territory—an area that ELFN and its members have been occupying since time immemorial. The area directly in and around the Site has been and is currently used by ELFN and its members for the exercise of constitutionally-protected Aboriginal and treaty rights. ELFN has a right to maintain and protect its way of life on these lands and this includes the right to steward these lands.
28. Moreover, the Site is approximately 79 kilometers away from the ELFN Reserve—only marginally farther than the distance between the Site and either Ignace or the WLON Reserve. It is clear that any potential impacts from the DGR that Ignace or WLON would be expected to bear will similarly impact ELFN. It is equally clear that any grounds for naming WLON or Ignace a host community on the basis of their proximity to the Site, would equally support ELFN being named a host community.
29. The duty to consult, and where appropriate accommodate, arises where the Crown contemplates conduct that has the potential to adversely affect a proven or credibly asserted section 35 Aboriginal or treaty right.<sup>6</sup>
30. Because the Site is within ELFN Territory (and where it exercises rights), the associated risks of burying used nuclear waste in the DGR have the potential to cause significant impacts on ELFN’s rights, including through developing such fear of the area that it drives land users away and dislocates them from their harvesting areas.
31. The honour of the Crown arises from, among other things, the Crown's assertion of sovereignty and *de facto* control of land and resources that were formerly in the control

<sup>6</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

of an Indigenous group.<sup>7</sup> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.<sup>8</sup>

32. The Supreme Court of Canada (“**SCC**”) stated “[t]he honour of the Crown informs the purposive interpretation of s. 35 of the [Constitution], and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed Aboriginal interest”<sup>9</sup> and that the Crown must take a broad purposive approach to the interpretation of a promise and must act diligently to fulfill it.
33. The Duty to Consult and Accommodate (“**Duty**”), which is of the highest order being a duty arising from the Constitution, is owed whenever the Crown contemplates conduct that might adversely affect the rights and interests of an Aboriginal people. A decision to site nuclear waste at this location is such conduct. There will be further Crown conduct to come in regard to this Site, including an environmental assessment. But the fact that a further Crown decision is to come does not relieve the Crown of its Duty now. In *all* instances, the Duty must be carried out in good faith, fulfilling the honour of the Crown, effecting reconciliation, and with the intent to substantially address the concerns of the affected Aboriginal people.
34. The siting of the DGR in ELFN Territory significantly implicates and threatens ELFN’s rights, interests and ELFN Territory. The Crown made promises in Treaty 3 to ELFN and made promises in the NFWA and the host community policy that it must fulfill broadly and purposively to be consistent with the honour of the Crown. NWMO has acknowledged the gravity and importance of the siting decision (but just not to ELFN).
35. NWMO and the federal Crown established the siting decision as a critical one, evidenced by them providing to proximate communities (host communities) the right to veto (or consent to) a site. No such veto or consent will be acknowledged, accorded or recognized in any later Crown conduct or decision.

<sup>7</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“*Haida*”) at para. 32.

<sup>8</sup> *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14 (“*Manitoba Metis*”) at para 66.

<sup>9</sup> *Manitoba Metis Federation* at para 73.

36. The NWMO and the federal Crown thus determined that for the siting Decision, concerns of a proximate or host community would be addressed or accommodated through having a consent or veto right.
37. While the Crown is ultimately responsible for ensuring that the Duty is fulfilled, through the above-referenced MOU, the Crown agreed to delegate to the NWMO certain procedural aspects of any Duty owed in relation to the NFWA, to the extent permitted by law.<sup>10</sup>
38. Given that the federal Crown and NWMO determined to effect accommodation through the consent/veto rights accorded to a host community, the determination of which Indigenous communities should have host community status must be made in a manner consistent with the Duty and its requirement to be carried out in good faith, honourably and with the purpose of effecting reconciliation. The Decision to refuse such status to ELFN fails on all fronts.
39. Furthermore, as an Indigenous people, ELFN and its members also have the following rights that are recognized in the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"), and which have been incorporated into Canadian law by the Crown's enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2020, c. 14 (the "**UNDRIP Act**"), including:
- a) the right to determine and develop priorities and strategies for the development or use of their lands, territories and resources (Article 32);
  - b) the right to extend, or withhold, consent for projects affecting their lands, territories, and resources, particularly in relation to the development, utilization or exploitation of mineral, water and other resources (Article 32);
  - c) the right to redress, including just, fair and equitable compensation, for their lands, territories and resources that have been taken, used or damaged (Article 32);

<sup>10</sup> Memorandum of Understanding, Her Majesty the Queen in Right of Canada and Nuclear Waste Management Organization, online: <https://natural-resources.canada.ca/our-natural-resources/energy-sources-distribution/nuclear-energy-uranium/radioactive-waste/memorandum-understanding/7753>.

- d) the right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources (Article 29); and
- e) the right not to have hazardous materials disposed of or stored on their lands and territories without their consent (Article 29).<sup>11</sup>

40. UNDRIP and the UNDRIP Act give direction, or at the very least guidance on what constitutes honourable and reconciliatory conduct of the Crown and NWMO here.

41. Accordingly, under applicable law and NWMO's own policies, NWMO was legally required to name ELFN a host community for the DGR or otherwise acquire its free, prior and informed consent to the Site prior to making any decisions in respect of development of the DGR in ELFN Territory. NWMO's refusal to do so is a serious breach of the Duty and dishonourable conduct.

***B. NWMO's conduct is not in keeping with its stated policies or its conduct in relation to the proposed site at Bruce Peninsula.***

42. The NWMO has made it clear that a Site would only be selected and Canada's plan for the storage of used nuclear fuel only implemented where consented to by a willing host.

43. Additionally, the NWMO has publicly posted policies in relation to Indigenous people, applicable here. The NWMO's "Reconciliation Policy" states, among other things:

- a) "The NWMO acknowledges, respects and honours that First Nation and Metis peoples of Canada have unique status and rights as recognized and affirmed in s.35 of the Constitution. The NWMO is committed to respecting the Aboriginal rights and treaties of First Nation and Metis peoples;
- b) The NWMO commits to meaningful engagement, including consultation as required, building respectful relationships, and seeking the free, prior and informed consent of impacted Indigenous peoples before proceeding with development of a deep geological repository;

<sup>11</sup> United Nations Declaration on the Rights of Indigenous Peoples, United Nations, 2007, Resolution of the General Assembly, Art. 29 & 32.

- c) The NWMO will work with impacted Indigenous communities in implementing our mandate under the [NFWA], and in the selection of a site...;
- d) The NWMO will work with the Crown regarding the Crown's duty to consult and accommodate as guided by decisions of the Supreme Court of Canada in fulfilling the NWMO's obligations under the NFWA. All of our work with respect to the duty to consult will be guided by Reconciliation.<sup>12</sup>

44. In violation of its own policy requiring NWMO to meaningfully engage and seek the free, prior and informed consent of impacted Indigenous peoples before proceeding with development of a DGR, NWMO refused to meaningfully engage with ELFN including to grant it host community status, despite ELFN repeatedly advising the NWMO that it has well-established and legally-protected rights relating to the Site.

45. Furthermore, as indicated above, the NWMO's decision as to the location of the DGR site came down to two potential locations: the Bruce Peninsula location and the WLON-Ignace location. As part of its decision-making process relating to the Bruce Peninsula, the NWMO was actively engaged with the Chippewas of Nawash Unceded First Nation ("**Nawash**") and the Saugeen First Nation. There, both First Nations were considered host communities for the proposed DGR site, even though, unlike with ELFN and WLON, the two Nations had never formally been considered one.

46. Here, ELFN and WLON have overlapping territories and were at one point one First Nation with a shared chief. Moreover, the ELFN Reserve is closer to the Site than the Nawash reserve was to the proposed Bruce Peninsula site and only 10 km farther from the Site than Saugeen First Nation would have been to the Bruce Peninsula location. Nonetheless, NWMO unjustifiably refused to accord host community status to ELFN.

47. NWMO's failure to act in accordance with its stated policies and consistent with its conduct related to the Bruce Peninsula location, constitutes a Decision that was arbitrary, inconsistent and dishonourable, and thus unreasonable.

<sup>12</sup> Nuclear Waste Management Organization, Reconciliation Policy, October 2019, online: <https://www.nwmo.ca/-/media/Reports---Files/PDFs/2019/10/17/14/55/Reconciliation-Policy-2019.ashx>.

**C. NWMO carried out the site-selection process in bad faith.**

48. Members of ELFN, other First Nations, and GCT3 have, at various points, expressed concern about the DGR being located in Treaty 3 territory. GCT3 has enacted resolutions voicing this concern and demonstrating that the concern is shared by many communities in Treaty 3 territory. In 2011, an Elders Declaration was made which expressed opposition to the storage of nuclear waste in Treaty 3. This 2011 Elders Declaration continues to be supported by GCT3, to this day.
49. However, though ELFN has raised reasonable concerns about the DGR being located in ELFN Territory, ELFN has never made a formal decision to support or oppose the project and has never carried out a community referendum or similar vote to canvass the support of its membership.
50. With regard to the Bruce Peninsula, Nawash and Saugeen First Nation similarly and publicly stated that they would not take a position on the DGR until a referendum could take place. They publicly stated that a vote was unlikely to take place before the end of 2024. Instead of continuing to engage with those First Nations and waiting for the results of the votes, the NWMO decided to move forward with the Site at WLON-Ignace, likely because WLON and Ignace had previously indicated they supported the DGR Site.
51. NWMO's refusal to meaningfully engage with ELFN and grant it host community status is based on a fear of non-support. If a Crown actor or delegate can pre-determine which First Nations it will listen to and respect based on which are likely to agree with what the Crown wants, this strips the rights of free, prior and informed consent, or any consent, of any meaning. It is akin to saying that everyone has the right to equality as long as you look and act like we want you to.

**D. NWMO's failure to adhere to the legitimate expectations it established was procedurally unfair.**

52. A "legitimate expectation" arises when an administrative decision-maker makes a representation that a certain process will be adhered to. "If a public authority has made representations about the procedure it will follow in making a particular decision, or if

it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected [entity] will be broader than it otherwise would have been.”<sup>13</sup>

53. Here, NWMO publicly outlined a process for the site-selection of the DGR wherein ELFN reasonably expected, based on the policy put forward by the NWMO and its conduct with regard to the Bruce Peninsula location, and based on ELFN’s proximity to the Site and its location in ELFN Territory, that NWMO would meaningfully engage with it and accord it host community status.

54. Additionally, following the parties’ October 2024 meeting and NWMO’s promise to follow-up on ELFN’s concerns in a fulsome manner, ELFN had a legitimate expectation that the NWMO would engage to determine how to grant ELFN host community status and ensure that it had the opportunity to hold a referendum in its community.

55. At minimum, procedural fairness requires that processes and rules are applied consistently and not arbitrarily. First Nations in similar situations facing the same facts and circumstances should be entitled to the same procedures and treatment. Here, procedural fairness required providing ELFN with the same opportunity to engage in the decision-making as WLON, Nawash and Saugeen First Nation.

56. NWMO’s failure to engage with ELFN in accordance with the legitimate expectations it established was procedurally unfair.

### **III. MATERIAL SUPPORTING THE APPLICATION:**

57. This Application will be supported by the following materials:

- a) Affidavits in support of the Application;
- b) Material requested pursuant to Rule 317 of the Federal Court Rules and produced to the Applicant and the Court pursuant to Rule 18; and
- c) Such other material as counsel may advise and this Court may allow.

<sup>13</sup> *Agraira v. Candaa (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94.

**IV. RULE 317 REQUEST:**

58. Pursuant to Rule 317 of the *Federal Court Rules*, the Applicant requests the Respondents send a certified copy to the Applicants and to the registry of all the material relevant to the Decisions and Impugned Conduct that is in possession of the Respondents and that is not in possession of the Applicants.

Dated: December 20, 2024



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**WOODWARD & COMPANY LAWYERS LLP**  
181 University Avenue, Suite 2200  
Toronto, ON  
M5H 3M7

**KATE KEMPTON**

LSO#: 44588L  
Tel: 416-571-6775  
Email: [kkempton@woodwardandcompany.com](mailto:kkempton@woodwardandcompany.com)

Lawyer for the Applicants