DOCKETS: A-56-14, A-59-14, A-63-14, A-64-14,
A-67-14; **A-437-14**, A-439-14, A-440-14
A-442-14, A-443-14, A-445-14, A-446-14,
A-447-14, A-448-14, A-514-14, A-517-14,
A-520-14, A-522-14

FEDERAL COURT OF APPEAL

BETWEEN:

GITXAAŁA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Hailtsuk Nation, MARTIN LOUIE on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

APPLICANTS AND APPELLANTS

AND:

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, NORTHERN GATEWAY PIPELINES INC., NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP and NATIONAL ENERGY BOARD

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AMNESTY INTERNATIONAL and THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

INTERVENERS

MEMORANDUM OF FACT AND LAW OF THE APPLICANT/APPELLANT GITXAAŁA NATION

Filed by:

ROBERT J.M. JANES and ELIN R.S. SIGURDSON
JFK Law Corporation
Suite 340 – 1122 Mainland Street
Vancouver, BC V6B 5L1
Tel: 604-687-0549 Fax: 604-687-2696
Email: rjanes@jfklaw.ca and esigurdson@jfklaw.ca

AND TO:

FEDERAL COURT
Attn: Judicial Administrator
Vancouver Office
701 West Georgia Street
Vancouver, BC V7Y 1B6

Counsel for the Applicant/Appellant Gitga'at First Nation
MICHAEL LEE ROSS AND GRACE JACKSON
1500 - 885 West Georgia Street
Vancouver, British Columbia V6C 3E8
T: 604-601-2083 F: 604-683-8125
E: ross@michaelleeross.com; gjackson@shaw.ca

Counsel for the Applicant/Appellant Haisla Nation
ALLAN DONOVAN, JENNIFER GRIFFITHS AND AMY JO SCHERMAN
Donovan & Company
6th Floor, 73 Water Street
Vancouver, British Columbia V6B 1A1
T: 604-688-4272 F: 604-688-4282
E*:* allan_donovan@aboriginal-law.com; Jennifer_Griffith@aboriginal-law.com; amyjo_scherman@aboriginal-law.com

Counsel for the Applicant/Appellant Council of the Haida Nation et. al.
TERRI-LYNN WILLIAMS-DAVIDSON
White Raven Law Corporation
16541 Upper Beach Road
Surrey, BC V3S 9R6
T: 604-536-5541 F: 604-536-5542
E: tlwd@whiteravenlaw.ca; sredmond@whiteravenlaw.ca; ebulbrook@whiteravenlaw.ca; justice@mjacksonlaw.ca; david.paterson@patersonlaw.ca

Counsel for the Applicants/Appellants Kitasoo Xai'Xais Band Council and Heiltsuk Tribal Council
LISA FONG
Ng Ariss Fong, Lawyers
210-900 Howe Street, Box 160
Vancouver, BC V6Z 2M4
T: 604-331-1155 F: 604-677-5410
E: lisa@ngariss.org; lisa@ngariss.com; Julia@ngariss.com; Julia@ngariss.org

Counsel for the Applicants/Appellants Nak'azdli Whut'en and Nadleh Whut'en
CHERYL SHARVIT
Mandell Pinder
300 – 1080 Mainland Street
Vancouver, BC V6B 2T4
T: 604-681-4146 F: 604-681-0959
E:Cheryl@mandellpinder.com; gavin_smith@wcel.org; jessica_clogg@wcel.org

Counsel for the Applicant/Appellant Unifor
STEVEN SHRYBMAN AND BEN PIPER
Sack Goldblatt Mitchell LLP
500 - 30 rue Metcalfe Street
Ottawa, ON K1P 5L4
T: 613-482-2456 F: 613-235-304
E:sshrybman@sgmlaw.com; bpiper@sgmlaw.com; klord@sgmlaw.com

Counsel for the Applicants/Appellants ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation
KAREN CAMPBELL AND BARRY ROBINSON
Ecojustice Canada
1000 – 5th Avenue SW, Suite 900
Calgary, Alberta T2P 4V1
T: 403-705-0202 F: 403-264-8399
E: brobinson@ecojustice.ca; kcampbell@ecojustice.ca

Counsel for the Applicant BC Nature
CHRIS TOLLEFSON
Environmental Law Centre
University of Victoria, Fraser Building
McGill Road at Ring Road
Victoria, British Columbia V8P 5C2
T: 250-888-6074
E: ctollef@uvic.ca; anho@uvic.ca; ELC.ArticledStudent@uvic.ca

Counsel for the Respondents Attorney General of Canada and Minister of the Environment
JAN BRONGERS, DAYNA ANDERSON AND KEN MANNING
Department of Justice Canada
900 - 840 Howe Street
Vancouver, BC V6Z 2S9
T: 604-666-0110 F: 604-666-1585
E: jan.brongers@justice.gc.ca; Dayna.anderson@justice.gc.ca;
ken.manning@justice.gc.ca; Catherine.douglas@justice.gc.ca

Counsel for the Respondents Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Ltd. Partnership
RICHARD A. NEUFELD, Q.C., BERNARD ROTH AND LAURA ESTEP
Dentons Canada LLP
15th Floor, 850-Second Street S.W.
Calgary, Alberta T2P 0R8
T: 403-268-7023 F: 403-268-3100
E:Richard.neufeld@dentons.com; Bernard.roth@dentons.com;
Laura.estep@dentons.com

Counsel for the Respondent National Energy Board
ANDREW HUDSON AND NICOLE GODBOUT
444 Seventh Avenue SW
Calgary, Alberta T2P 0X8
T: 403-292-6540 F: 403-292-5503
E: Andrew.hudson@neb-one.gc.ca; nicole.godbout@neb-one.gc.ca

Counsel for the Intervener Attorney General of British Columbia
ANGELA COUSINS
Ministry of Justice
Aboriginal Law and Litigation Group
3rd Floor, 1405 Douglas Street
PO Box 9270, Stn Prov Govt
Victoria, BC V8W 9J5
T: 250.387.2890 F: 250-387-0343
E: angela.cousins@gov.bc.ca; lori.wist@gov.bc.ca

Counsel for the Intervener Amnesty International
JUSTIN SAFAYENI AND NAOMI GRECKOL-HERLICH
Stockwoods LLP
TD North Tower
77 King Street West
Suite 4130, PO Box 140
Toronto, Ontario M5K 1H1
T: 416-966-0404 F: 416-966-2999
E: justinS@stockwoods.ca

COLLEEN BAUMAN
Sack Goldblatt Mitchell LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
T: 613.482.2463 F: 613-235-3041
E: CBauman@sgmlaw.com

Counsel for the Intervener Canadian Association of Petroleum Producers
KEITH BERGNER, LEWIS MANNING, AND TONY KRUGER
Lawson Lundell LLP
1600-925 West Georgia Street
Vancouver, BC V6C 3L2
T: 604.685-3456 F: 604-669-1620
Email: lmanning@lawsonlundell.com; kbergner@lawsonlundell.com;
tkruger@lawsonlundell.com

Guide to Memorandum References

Compendium

Gitxaała Nation has prepared a Compendium of References to which this Memorandum of Fact and Law refers. The Compendium consists of extracts of the evidence to which Gitxaała draws the Court's attention. Each extract is cross-referenced in Gitxaała's Memorandum with reference to volume, tab and page numbers where applicable: e.g. [GCR Vol 1, Tab 5, p 555]. Full documents are available to the Court on the Electronic Record filed by the Responsible Person.

Exhibit and Transcript Numbers from the JRP Record

Where a document number is referred to, this refers to the Exhibit number of the document before the Joint Review Panel (JRP), and it can be found in full in the Electronic Record in the Folder titled "NEB Documents." For example, Exhibit **D72-52-07** would be found in the subfolder for Intervenors (**D - Intervenors**) and the sub-subfolder for Gitxaała Nation (**D072 – Gitxaała Nation**).

These exhibits are referenced by pdf page number as found in the Electronic Record, and are cross-referenced to Gitxaała's Compendium of References.

Numbered transcript volumes are also found in full in the Electronic Record in the "NEB Documents" folder under "Transcripts". For example, **TR Vol 28**, indicating Transcript Volume 28, would be found in the Electronic Record in the Folder "NEB Documents", in the subfolder "Transcripts", in which the Transcripts are listed by volume number (i.e. "12-03-14 International Reporting Inc. - OH-4-2011 Hearing Transcript **-_28**")

Short Forms

The Agreed Statement of Facts includes a number of short forms and Gitxaała adopts these in the Memorandum except where otherwise noted.

The following abbreviations are used to specify certain volumes or types of common documents or other locations.

AF: Statement of Agreed Facts (Found at Tab 1 of the Book of Major Documents)

CB: Basic Common Book of Documents

ER: Electronic Record

GCR: Gitxaała Compendium of References

TR: Transcript (volume)

MB: Book of Major Documents

Opening Statement

1. Canada breached its constitutional obligations to Gitxaała by approving the Project.[1] Despite Gitxaała's consistent efforts to engage Canada, the Crown declined to meaningfully consult Gitxaała about their Aboriginal title and Aboriginal right to govern the lands and waters of their territory ("Title and Governance Rights"), and unjustifiably infringed those rights. Canada compounded this disrespect by failing to comply with its own legislation. The approvals for the Project were granted in a manner that was dishonourable and misleading to Gitxaała, ignored their decisions and concerns about the Project, and thwarted the purpose of achieving reconciliation.

2. Gitxaała challenges the Order and the Certificates on the basis that they were issued without required consultation and they unjustifiably infringe Gitxaała's Title and Governance Rights in the heart of their territory (the "Core Claim Area").[2] Gitxaała also argues the Order and the JRP Report are made contrary to the applicable legislation and unlawfully delegate statutory duties. Absent a lawful JRP Report and/or Order, the Certificates cannot stand.[3]

Part I – Facts: Gitxaała Nation, People of the Salt Water

3. Since 2009, Gitxaała has made it clear that they cannot authorize NGP's proposal to ship diluted bitumen through their territory.[4] The Project would see tankers pass at a rate of 1.2 transits per day[5] through the Core Claim Area, past 16 of Gitxaała's reserves,[6] past Gitxaała's main village of *Lach Klan*,[7] through their prime fishing grounds,[8] transportation corridor[9] and important sacred sites.[10] Each transit

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[1] The defined terms and short forms set out in the Statement of Agreed Facts ("AF") [Book of Major Documents ("MB"), Vol 1, Tab 1] are adopted except where otherwise defined. The Amended JRP Agreement defines the Project as including the associated tanker traffic that will be servicing the Project [MB Vol 1, Tab 10, p 226].

[2] Basic Common Book ("CB"), Vol 1, Tab 7, p 106; Vol 3, Tab 32, p 1267, 1274.

[3] Notice of Application (JRP), CB Vol 1, Tab 3; Notice of Application (GIC), CB Vol 1, Tab 7; Notice of Appeal (Certificates), Vol 1, Tab 17.

[4] Transcript ("TR") Vol 26, paras 16236-16240 [Gitxaała's Compendium of References ("GCR") Vol 2, Tab 10, p 590]; Affidavit of Jim Clarke, 4 February 2015 ("Clarke Affidavit"), Ex B, Doc # 7, pdf page 116 [GCR Vol 4, Tab 59, p 1272].

[5] NGP Application: Vol 8B, Ex B3-26, pdf page 29 [Electronic Record ("ER"), Tab 33 (Schedule A)].

[6] Affidavit of Germaine Conacher, 25 June 2012 ("Conacher Affidavit"), D72-50-2, pdf page 6 [GCR Vol 2, Tab 20, p 879].

[7] See Affidavit of Elmer Moody, 18 December 2011 ("Moody Affidavit"), D72-22-04 at pdf page 10 [GCR Vol 13, Tab 40, p 1062]. (*Lach Klan* is also known as Kitkatla).

[8] Witness Statement of Joe (Fred) Spencer ("Spencer Statement"), D72-52-6, pdf page 6 [GCR Vol 2, Tab 7, p 555]; Witness Statement of Muriel Milton ("Milton Statement"), D72-52-7, pdf pages 3-4 [GCR Vol 2, Tab 9, p 576-577]; *Gitxaała Nation Use Study* ("Gitxaała TUS"), D72-12-07, pdf pages 7, 10 [GCR Vol 2, Tab 19, p 873].

would take up to 18 hours[11] and multiple tankers at a time could be stationed at anchorage and holding sites in Gitxaała's territory.[12]

4. Canada and the NEB established the JRP to review the Project.[13] As the NEB acts as an arm's length decision maker, the JRP could not carry out the duty to consult.[14] Despite this, Canada focused its consultation efforts on the JRP and chose to use the JRP's hearing process as the primary means of gathering information from Aboriginal groups, hearing Aboriginal groups' concerns, and assessing environmental impacts. Canada insisted that, to be heard at all, Gitxaała must participate in the JRP process.[15] This would be Gitxaała's only venue to present evidence of their rights and describe their concerns with the Project.[16]

5. From the outset, Gitxaała explained the inadequacy of the environmental assessment process for dealing with impacts to, and assessing infringements of, Aboriginal rights arising from the Project.[17] Canada assured Gitxaała that the JRP's mandate required it to consider potential impacts to Gitxaała's rights and that issues left unaddressed by the JRP would be meaningfully considered and addressed in Phase IV, before the GIC's decision was made.[18]

6. In the course of the JRP hearings, Canada fundamentally changed the process by stripping the NEB of its decision-making role, reducing the JRP's report to a

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[9] TR Vol 28, paras 17791-17795 [GCR Vol 2, Tab 12, p 680]; Gitxaała TUS, D72-12-07, pdf page 8 [GCR Vol 2, Tab 19, p 874].

[10] Gitxaała TUS, D72-12-03, pdf pages 36-38 [GCR Vol 2, Tab 19, p 821-823]; D72-12-07, pdf pages 9-10 [GCR Vol 2, Tab 19, p 876-877].

[11] *Re: Proposed Northern Gateway Project* ("Bergin Report"), D72-24-12, pdf page 6, para 8.1 [GCR Vol 3, Tab 23, p 888].

[12] NGP Application: Vol 8A, B3-24, pdf pages 31, 37-38 [ER Tab 33 (Schedule A)].

[13] AF, p 3, paras 8-10.

[14] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 [*Rio Tinto*] at paras 59-60, 74; *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159, [1994] SCJ No 13 (QL) [*Quebec (Attorney General)*] at paras 32-37.

[15] Moody Affidavit, D72-22-03, pdf page 3 [GCR Vol 3, Tab 39, p 1048].

[16] MB Vol 1, Tab 3, p 81-82, 84-85, 88; Moody Affidavit, D72-22-03, pdf page 3 [GCR Vol 1, Tab 39, p 1050-1053].

[17] Moody Affidavit, D72-22-04, pdf pages 17-29; D72-22-05, pdf page 1 [GCR Vol 3, Tab 42, p 1069-1081A]; Clarke Affidavit, Ex B, Doc # 81 [GCR Vol 4, Tab 60].

[18] Aboriginal Consultation Framework [MB Vol 1, Tab 3, p 88]; Amended Hearing Order [MB Vol 1, Tab 9, p 194]; JRP Report: Vol 2 [CB Vol 2, Tab 21, p 475]; Moody Affidavit, D72-22-03, pdf pages 3, 6 [GCR Vol 1, Tab 39, p 1050-1053]; Affidavit of Clarence Innis, 2 February 2015 ("Innis Affidavit"), Ex 19, pdf page 97; Ex 45, pdf page 782; Ex 51, pdf pages 988-989; Ex 57, pdf page 1029 [GCR Vol 3, Tab 46, p 1162; Tab 48, p 1166; Tab 50, p 1179-1180; Tab 54, p 1224]; Clarke Affidavit, Ex B, Doc # 116, pdf page 2093; Ex B, Doc # 119C, pdf page 2258 [GCR Vol 4, Tab 61, p 1293; Tab 64, p 1372]; TR Vol 173, para 26417 [GCR Vol 3, Tab 32, p 948].

recommendation and transferring all decision-making power to the GIC.[19] The JRP could no longer decide the constitutional issues raised by Gitxaała.[20] Despite this, Gitxaała continued to participate in the process. The JRP remained the only forum to present evidence of Aboriginal rights and express concerns, and Gitxaała understood from Canada's representations that if issues were not addressed by the JRP, they would be addressed by Canada during Phase IV.[21]

A. Gitxaała's participation in the JRP process

7. Gitxaała led a detailed and comprehensive evidentiary record proving their claim to Title and Governance Rights, spiritual and cultural rights and harvesting rights.[22] This evidence formed the basis of their claims and concerns before the JRP, Canada and this Court.

8. Gitxaała's evidence established they are an ancient, self-governing nation that has lived and thrived on the northwest coast of what is now British Columbia for thousands of years. They call themselves *Git Lax Moon*, or the "People of the Salt Water",[23] highlighting the vital link between Gitxaała culture and identity and the waters and marine resources of Gitxaała's traditional territory.[24] Gitxaała's evidence countered the stereotypical understanding of Aboriginal people as merely subsisting

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[19] *Jobs Act*, ss 83, 104(2). These changes were brought about by way of two omnibus bills (Bill C-38 and Bill C-45) that made significant changes to Canada's environmental laws. Canada did not consult with Aboriginal groups in relation to these changes. See *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244, [2014] FCJ No 1308.

[20] Gitxaała filed a Notice of Constitutional Question early in the JRP process that called upon the JRP to determine the constitutional issues raised by Gitxaała [CB Vol 3, Tab 28]. Following the changes to the JRP process, Gitxaała amended the Notice to reflect the altered powers of the JRP [CB Vol 3, Tab 29]. Prior to hearing argument on the Notice, Canada submitted that the JRP should not determine the issues it raised, stating that the questions were premature for determination [E9-55-1, pdf page 2, para 2] [GCR Vol 1, Tab 35, p 997]. NGP submitted that the JRP had no jurisdiction to determine the questions [B174-2, pdf page 4, para 12] [GCR Vol 1, Tab 36, p 1025]. See the JRP rulings on the Notice at A341-1 [GCR Vol 1, Tab 37, p 1037] and A361-1 [GCR Vol 1, Tab 37, p 1044], determining it could not rule on whether the *NEBA* permitted an Order to be made by the GIC that infringes Aboriginal rights, and its constitutionality.

[21] See footnote 16.

[22] Gitxaała's evidence is summarized in Gitxaała's final written submissions to the JRP ("JRP Final Argument"), D72-92-2 [GCR Vol 1, Tab 2]; comments on the JRP Report ("JRP Report Submissions") [GCR Vol 1, Tab 5]; and correspondence in Phase IV consultations [Innis Affidavit, Ex 22]. Key sources of evidence include oral testimony provided by Gitxaała members at the Community Hearings [TR Vol 26-29, 42-43]; witness statements from seven Gitxaała members [D72-52]; and written evidence filed by Gitxaała with the JRP including *Gitxaała Use and Occupancy in the Area of the Proposed Northern Gateway Pipeline Tanker Routes* ("Menzies Report"), D72-24-02 – D72-24-09; *The Gitkxaala, Their History, and Their Territories* ("Marsden Report"), D72-33-2; and the Gitxaała TUS [D72-12].

[23] TR Vol 26, para 16184 [GCR Vol 2, Tab 10, p 585].

[24] JRP Final Argument [GCR Vol 1, Tab 2, p 264-266]; TR Vol 26, para 16374 [GCR Vol 2, Tab 10, p 599]; Moody Affidavit, D72-22-04, pdf page 10 [GCR Vol 3, Tab 40, p 1062].

in their environment – "climbing over rocks looking for food to eat"[25] – by demonstrating the complex political and cultural systems that allow them to possess and govern their territories.

A.1 Gitxaała's evidence before the JRP proves their existing Aboriginal title

9. Gitxaała's submissions to the JRP and GIC detail the factual and legal basis for their rights claims and elaborate Gitxaała's evidence and concerns about the Project.[26] Gitxaała's evidence proves occupation of their territory, including the Core Claim Area, by demonstrating Gitxaała's exclusive governance and use of the territory as well as its central significance to Gitxaała's way of life.[27] The evidence shows that Gitxaała's Aboriginal title extends to the lands and waters of their territory including waterways, submerged lands, and the intertidal zone.[28]

A.1.1. Gitxaała's governance system proves occupation of their territory

10. Gitxaała demonstrated exclusive occupation of their territory with evidence of the legal system by which Gitxaała governs their lands and waters. Gitxaała consists of four clans: the *Gisbutwada* (Blackfish), *La̲xgibuu* (Wolf), *G̲anhada* (Raven) and *La̲xsgiik* (Eagle).[29] Each Gitxaała person is born into a clan. As Gitxaała is a matrilineal society, clan affiliation is determined by the mother's side. Clans are further subdivided into *walp* or Houses, which govern all of Gitxaała's territory.[30] Gitxaała's House structure empowers each *Sm'gigyet* (House Leader) to govern, use and manage his House territories and is the foundation of Gitxaała's traditional governance system.[31] Each *Sm'gigyet*'s property comprises a "treasure box," or

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[25] TR Vol 26, para 16276 [GCR Vol 2, Tab 10, p 594].
[26] See JRP Final Argument [GCR Vol 1, Tab, p 22-323]; JRP Report Submissions [GCR Vol 1, Tab 5, p 374-483]. The JRP and GIC made no findings about Gitxaała's Title and Governance Rights. These submissions should be reviewed to appreciate Gitxaała's claims.
[27] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 [*Delgamuukw*] at para 143-144; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256, 2014 SCC 44 [*Tsilhqot'in*] at paras 25-26, 30-31; *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at paras 15-20, 89.
[28] TR Vol 26, paras 16472-16473 [GCR Vol 2, Tab 10, p 603]; TR Vol 27, paras 16580-16582, 16734, 16736-16737 [GCR Vol 2, Tab 11, p 607, 614-15]; TR Vol 28, para 17797 [GCR Vol 2, Tab 12, p 681]; TR Vol 29, paras 18882-18884 [GCR Vol 2, Tab 13, p 704]; Menzies Report, D72-24-03, pdf pages 3, 10-11, paras 194-195 [GCR Vol 2, Tab 17, p 787, 797-798].
[29] Gitxaała TUS, D72-12-03, pdf page 15 [GCR Vol 2, Tab 19, p 806].
[30] TR Vol 26, para 16173 [GCR Vol 2, Tab 10, p 583]; TR Vol 28, para 17632 [GCR Vol 2, Tab 12, p 672]; Menzies Report, D72-24-02, pdf page 13 [GCR Vol 2, Tab 17, p 767]; Spencer Statement, pdf page 2 [GCR Vol 2, Tab 7, p 551].
[31] TR Vol 26, paras 16173-16175, 16195 [GCR Vol 2, Tab 10, p 583]; TR Vol 42, paras 30969, 30972 [GCR Vol 2, Tab 14, p 720].

galüünx, including names, stories, crests, songs, lands, waters and resources.[32] It is transferred through a process called "*gugwuilx'ya'ansk,*" meaning "to pass down through generations" or "inheritance."[33] Each *Sm'gigyet* traces his position and his *gugwuilx'ya'ansk* back to a supernatural being – a *naxnox* – and is imposed with a duty to preserve his property and the status of his House so that it can be passed down to the next generation.[34] Gitxaała have maintained continuous ownership and control of the lands, waters, and resources within their House territories for thousands of years through *gugwuilx'ya'ansk*.[35]

11. The exclusive right to govern was asserted by Gitxaała from their first contact with Europeans. In 1787, Seaxs confronted Captain Colnett – one of the first Europeans to enter Gitxaała's territory – demanding that he respect Seaxs' ownership and control over the anchorage and resources that Colnett was using. Ignoring Gitxaała's laws and customs, Colnett and his men attacked Seaxs and his people. Seaxs' challenge to Captain Colnett and his crew took place near the village of Ks'waan, at the southern tip of Banks Island, near the proposed route of the tanker traffic.[36] Gitxaała also routinely drove neighbouring Aboriginal groups out of their territory.[37]

12. Gitxaała's elders and experts demonstrated that their system of exclusive governance of the territory has been in place for thousands of years, transmitted through a system of rules and laws recorded in Gitxaała's *adawx* (oral history).[38] This oral history, conveyed in accordance with a strict process of recounting to ensure its accuracy and completeness, establishes Gitxaała's presence in and control

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[32] TR Vol 26, para 16307 [GCR Vol 2, Tab 10, p 598]; TR Vol 27, para 16589 [GCR Vol 2, Tab 11, p 608].

[33] Gitxaała TUS, D72-12-03, pdf page 16 [GCR Vol 2, Tab 19, p 807]; TR Vol 26, para 16201 [GCR Vol 2, Tab 10, p 587].

[34] TR Vol 26, paras 16223, 16225, 16385-16390, 16450 [GCR Vol 2, Tab 10, p 588, 600-602]; TR Vol 43, paras 31506-31507 [GCR Vol 2, Tab 15, p 737]; Marsden Report, pdf page 16 [GCR Vol 2, Tab 16, p 754-2].

[35] TR Vol 27, paras 16657, 16716 [GCR Vol 2, Tab 11, p 609, 612].

[36] Menzies Report, D72-24-02, pdf pages 11, 15, paras 29-30, 45 [GCR Vol 2, Tab 17, p 765 and 770]. One of Seaxs' relatives provided a witness statement [Spencer Statement, pdf page 3] [GCR Vol 2, Tab 7, p 552].

[37] Marsden Report, pdf pages 7-8, 22-23, 28, 47, 65, paras 4, 71, 76, 90 [GCR Vol 2, Tab 16, p 747-748, 755-759]; Menzies Report, D72-24-02, pdf page 12, para 35 [GCR Vol 2, Tab 17, p 766].

[38] TR Vol 26, para 16272 [GCR Vol 2, Tab 10, p 589]; TR Vol 27, paras 16657, 16716 [GCR Vol 2, Tab 11, p 609, 612]; TR Vol 28, para 17769 [GCR Vol 2, Tab 12, p 678]; Vol 42, para 30960 [GCR Vol 2, Tab 14, p 719]; Marsden Report, pdf pages 7, 13. Gitxaała's written evidence to the JRP included copies of materials prepared by a number of ethnographers [Affidavit of Linda Mattson, 15 December 2011, D72-19 - D72-20 ("Mattson Affidavit")].

of its territory for thousands of years with the lands and waters being continuously used to the present.[39]

A.1.2 Gitxaała's place names prove their occupation of the territory

13. Gitxaała use two words to describe their territory: *laxuulp* (land) and *lax aks* (water).[40] They named the places and water bodies within their territory after species of plants, birds, animals or fish harvested there, the spiritual beings living there, events in Gitxaała's history such as floods, fires or wars, and geographical features such as strong tides or rock slides.[41] Gitxaała's names are recognized and used by other Aboriginal groups in the area[42] and are found along the route of the proposed tanker traffic.[43]

A.1.3 Gitxaała's use of their territory proves their exclusive occupation

14. The historical record shows that the Tsimshian Nations, in which Gitxaała has been grouped, had concepts of territory and ownership that meant that conflicts over uses of lands would be resolved and, if the conflicts involved occupation or taking resources, resolved through obtaining permissions.[44] There is no evidence in the record showing claims in the Core Claim Area by other First Nations; use or occupation of the area by other First Nations; or extinguishment of Aboriginal title.

15. Gitxaała's evidence demonstrates extensive use of the Core Claim Area. There are numerous village sites and camps situated throughout the territory, many of which date back thousands of years.[45] Gitxaała's main modern community of *Lach Klan* has been continuously occupied for over nine millennia as a winter village.[46] It is one of the longest continually occupied settlements on the BC coast.[47] The Crown recognized some villages as well as certain key fishing stations as reserves, which were set aside to secure valuable fishing sites.[48] Sixteen such

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[39] Menzies Report, D72-24-02, pdf pages 8-11, paras 19-27 [GCR Vol 2, Tab 17, p 762-765]; TR Vol 26, paras 16181-16182, 16271[GCR Vol 2, Tab 10, p 584]; TR Vol 27, para 16657 [GCR Vol 2, Tab 11, p 609]; TR Vol 43, paras 31598, 31781 [GCR Vol 2, Tab 15, p 743].
[40] TR Vol 27, paras 16580-16582 [GCR Vol 2, Tab 11, p 607].
[41] TR Vol 26, para 16372 [GCR Vol 2, Tab 10, p 599]; TR Vol 42, paras 31213-31216 [GCR Vol 2, Tab 14, p 722]; Visual Aid # 69 [GCR Vol 2, Tab 22, p 886].
[42] TR Vol 42, paras 31238-31239 [GCR Vol 2, Tab 14, p 724].
[43] Visual Aid # 69 [GCR Vol 2, Tab 22, p 886].
[44] Marsden Report, pdf pages 9-14; Menzies Report, D72-24-02, pdf page 37, paras 129-131.
[45] Menzies Report, D72-24-02, pdf pages 23-24, 33-35, paras 79-80, 117-125.
[46] Menzies Report, D72-24-02, pdf page 26, para 96 [GCR Vol 2, Tab 17, p 778].
[47] Menzies Report, D72-24-02, pdf page 33, para 115 [GCR Vol 2, Tab 17, p 785]; TR Vol 42, para 30752 [GCR Vol 2, Tab 14, p 718].
[48] Menzies Report, D72-23-02, pdf pages 28-29, para 102 [GCR Vol 2, Tab 17, p 780-781]; Minutes of Decision (Reserve Creation Documents), D72-13-01, pdf pages 4, 6 [GCR Vol 2, Tab 21, p 882-

reserves and dozens of other traditional villages and camps border the tanker route.[49] Water bodies such as Principe Channel, Browning Entrance, Kitkatla Inlet, Porcher Inlet, Freeman Pass, Mink Trap Bay and other channels and bays were and are used extensively as transportation routes and harvesting areas.[50]

16. Harvesting natural resources from their territory is critical to Gitxaała.[51] The evidence shows that Gitxaała continually harvest resources throughout the territory to sustain their isolated community.[52] The waters, lands and inter-tidal areas of the Core Claim Area are used to harvest a wide variety of species including salmon, halibut, herring, seals, sea lions, deer, geese, ducks, crab, prawns, shrimp, a variety of rockfish, abalone, clams, cockles, chitons, Chinese slippers, seaweed, kelp, sea cucumbers, scallops, sea urchins, octopus, sea bird eggs, herring roe on kelp, and a variety of berries and medicinal plants.[53] Gitxaała demonstrated their deep knowledge of where and when resources would be available and how to harvest and process these resources.[54] The evidence also shows that certain resources are localized and cannot be found elsewhere in the territory, and that resources harvested from one area (such as types of kelp) are needed to harvest resources from another area (such as herring roe).[55] The ability to continue this traditional harvest and for the *Sm'gigyet* to govern and regulate that harvest is crucial to the identity of Gitxaała.[56]

17. Gitxaała's cultural practices cannot be separated from their harvesting activities. The phrase *syt güülm goot* ("of one heart") captures Gitxaała's

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883]; *Gitxaała Indian Reserves and Marine Harvesting* ("Harris Report"), D72-24-10, pdf page 6, paras 10-11 [GCR Vol 2, Tab 18, p 800].

[49] Conacher Affidavit, D72-50-2, pdf page 6 [GCR Vol 2, Tab 20, p 879]; Menzies Report, pdf pages 33-35, paras 117-125 [GCR Vol 2, Tab 17, p 785-787].

[50] Gitxaała TUS, D72-12-02, pdf page 17; D72-12-04, pdf pages 6-7 [GCR Vol 2, Tab 19, p 824-825]; TR Vol 28, para 17795 [GCR Vol 2, Tab 12, p 642].

[51] JRP Final Argument, pdf pages 214-228 [GCR Vol 1, Tab 2, p 235-249].

[52] Gitxaała TUS, D72-12-03, pdf page 24 [GCR Vol 2, Tab 19, p 812]; Milton Statement, pdf pages 5-8 [GCR Vol 2, Tab 9, p 578-581]; Witness Statement of Gilbert Hill, D72-52-4 ("Hill Statement"), pdf page 6 [GCR Vol 2, Tab 8, p 569]; TR Vol 28, paras 17963, 17966, 17979, 17982, 17993, 18010, 18015, 18018, 18021 [GCR Vol 2, Tab 12, p 683-687]; TR Vol 27, para 17356 [GCR Vol 2, Tab 11, p 622]; TR Vol 29, para 18777; [GCR Vol 2, Tab 13, p 703].

[53] Gitxaała TUS, D72-12-04, pdf pages 8-17, D72-12-05, pdf pages 1-21, D72-12-06, pdf pages 1-22 [GCR Vol 2, Tab 19, p 826-866].

[54] See e.g. TR Vol 28, paras 17525, 17946, 17994, 18016, 18021-18024, 18050, 18130, 18160, 18180, 18192, 18228, 18230, 18240 [GCR Vol 2, Tab 12, p 668, 682, 686-695].

[55] TR Vol 28, paras 18192, 18226 [GCR Vol 2, Tab 12, p 692-693]; TR Vol 29, paras 18676, 18920, 19012, 19094, 19098, 19495-19501 [GCR Vol 2, Tab 13, p 701, 705-707,709]; Spencer Statement, pdf page 10 [GCR Vol 2, Tab 7, p 559].

[56] TR Vol 27, paras 16736-16739 [GCR Vol 2, Tab 11, p 614-615].

interconnectedness with their lands and waters.[57] In order for Gitxaała to be *syt güülm goot*, the needs of Gitxaała must be carefully balanced with those of the territory and its resources.[58] Many other cultural practices depend on specific places and resources within the territory including rites of passage, teaching, language, feasting, use of medicines, trade, and burial.[59]

18. Gitxaała's spiritual geography of their territory also demonstrates use and occupation. The *naxnox* are the supernatural beings at the centre of Gitxaała's world view that guide Gitxaała customs and traditions and reside at various locations in the territory.[60] The *naxnox* taught Gitxaała the values and beliefs that define their culture and laws.[61] There are specific practices, customs and traditions requiring that *naxnox* be cared for and respected[62] and that prohibit traversing or anchoring boats in areas that are the homes or dens (the "*spanoxnox*") of the *naxnox*.[63] The *spanoxnox* are places of profound spiritual significance found throughout Gitxaała's territory, including along the tanker route.[64] If disrespected, even by a third party, *naxnox* can withdraw resources from the territory to the detriment of Gitxaała.[65]

A.2 Gitxaała's evidence before the JRP proves existing Governance Rights

19. Gitxaała's evidence demonstrates the importance of their system of governance as an integral part of Gitxaała's distinct culture.[66] Respect for the power and right of the *Sm'gigyet* to decide when, how, and by whom their

[57] Menzies Report, D72-24-02, pdf page 17, para 50 [GCR Vol 2, Tab 17, p 771].
[58] TR Vol 27, paras 17065-17066 [GCR Vol 2, Tab 11, p 616].
[59] TR Vol 27, paras 16727-16728 (trade), 17337 (teaching and language), 17373-17374 (teaching) [GCR Vol 2, Tab 11, p 613, 621, 624]; TR Vol 28, paras 17438-17439 (feasting and burial) [GCR Vol 2, Tab 12, p 680]; Vol 29, 18534-18535 (use of medicines) [GCR Vol 2, Tab 13, p 699-670]; TR Vol 42, para 31263 (feasting and burial) [GCR Vol 2, Tab 14, p 725]; TR Vol 43, paras 31585-31588 (rites of passage) [GCR Vol 2, Tab 15, p 741-742]; Hill Statement, pdf page 4 (teaching); pdf pages 8-9 (feasting) [GCR Vol 2, Tab 8, p 567, 571-572]; Spencer Statement, pdf page 5 (burial) [GCR Vol 2, Tab 7, p 554]; Milton Statement, pdf pages 5 (use of medicines), 6 (trade) [GCR Vol 2, Tab 9, pp 578-579].
[60] TR Vol 26, paras 16221-16227; [GCR Vol 2, Tab 10, p 588-589]; Gitxaała TUS, D72-12-03, pdf pages 34-35 [GCR Vol 2, Tab 19, p 819-820].
[61] TR Vol 43, para 31506 [GCR Vol 2, Tab 15, p 737].
[62] TR Vol 42, paras 31345-31346, 31358-31360 [GCR Vol 2, Tab 14, p 730-732]; TR Vol 43, paras 31434-31435 [GCR Vol 2, Tab 15, p 734].
[63] TR Vol 43, para 31445 [GCR Vol 2, Tab 15, p 735].
[64] Gitxaała TUS, D72-12-10, pdf pages 15-16 [GCR Vol 2, Tab 19, p 877-1, 877-2].
[65] Gitxaała TUS, D72-12-03, pdf page 35 [GCR Vol 2, Tab 19, p 820]; Clarke Affidavit, Ex B, Doc # 118, pdf page 2151 [GCR Vol 4, Tab 63, p 1351].
[66] See Final JRP Argument, pdf pages 195-205 [GCR Vol 1, Tab 2, pages 216-226].

gugwuilx'ya'ansk would be used is central to what it means to be Gitxaała.[67] To disrespect that right would be *hawalk:* an activity or action forbidden by Gitxaała's traditional laws.[68] Similarly, for a *Sm'gigyet* to fail to discharge his duties to maintain and pass on his *gugwuilx'ya'ansk* would be similarly *hawalk* and would "dirty the Chief's blanket" – with the blanket being the symbol of a House Leader's power to govern – until appropriate corrective action was taken.[69] For tanker traffic to be imposed on a *Sm'gigyet's* territory contrary to his wishes would be *hawalk*; any action that shows disrespect to marine resources, including the salt water, or places those resources at risk, is *hawalk*[70] and would diminish the status of the *Sm'gigyet.*[71]

A.3 Gitxaała could not approve the Project given its unacceptable effects

20. Gitxaała determined they had to reject the Project because of the serious adverse effects that would result from the Project, from routine operations as well as accidents or malfunctions. As understood from Gitxaała's perspective, the Project would impact Gitxaała's Title and Governance system, their spiritual and cultural relationship with their territory, their harvesting of resources and, potentially, their ability to maintain their way of life in the event of a major oil spill.

21. During the JRP process, Gitxaała provided evidence of the impacts from the continuous movement of tankers through their territory. Gitxaała's witnesses explained how imposing the Project contrary to the decision of the *Sm'gigyet* would have impacts on Gitxaała's governance system, such as loss of the *Sm'gigyet*'s authority and jurisdiction over their territories and diminishment of their status and rank.[72] These effects, for which no mitigation measures have been proposed, rendered it impossible for Gitxaała to approve the use of their territory for the Project.

22. The regular operation of tankers would also interfere with Gitxaała's spiritual places, including *spanaxnox*, desecrating those areas and causing negative

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[67] Gitxaała TUS, D72-12-03, pdf pages 16-18 [GCR Vol 2, Tab 19, p 807-809]; TR Vol 26, paras 16201-16204 [GCR Vol 2, Tab 10, p 587].
[68] TR Vol 26, paras 16375-16376, 16384-16390 [GCR Vol 2, Tab 10, p 599-601]; TR Vol 28, paras 17446, 17624-17629 [GCR Vol 2, Tab 12, p 661, 671-672]; TR Vol 42, para 31268 [GCR Vol 2, Tab 14, p 726].
[69] TR Vol 26, para 16385-16390, 16450 [GCR Vol 2, Tab 10, p 600-602]; Spencer Statement, pdf page 12 [GCR Vol 2, Tab 7, p 561].
[70] TR Vol 28, para 18320 [GCR Vol 2, Tab 12, p 697]; TR Vol 42, paras 31150, 31268, 31296-31297 [GCR Vol 2, Tab 14, pp 721, 726, 729].
[71] TR Vol 26, para 16387 [GCR Vol 2, Tab 10, p 600].
[72] Gitxaała Response to JRP IR No 1, D72-47-2, pdf page 6 [GCR Vol 1, Tab 1, p 6]; TR Vol 28, paras 17611-17614 [GCR Vol 2, Tab 12, p 669-670].

consequences by disturbing the *naxnox*, which could lead to the withdrawal of the benefits they have bestowed on Gitxaała and the *Sm'gigyet*.[73] They would also impede Gitxaała's culture and way of life.[74] It would significantly interfere with their fishing and harvesting activities in a number of ways, including causing harm to harvested species, preventing access to harvesting sites and causing damage to Gitxaała's vessels and gear through potential collisions and effects of wake.[75] The tankers would also subject Gitxaała to the constant threat of a major marine spill. The experience of living in fear of a catastrophic oil spill, even without the spill materializing, was never assessed by either the JRP or Canada as a form of harm.[76]

23. Gitxaała provided evidence about the devastating impacts they would experience from a major oil or condensate spill in their territory.[77] They explained that a major spill would impact Title and Governance Rights including long-term or permanent damage to House territories and the resources they support,[78] as well as long-term and widespread impacts to cultural, spiritual, and harvesting practices.[79] Representatives of NGP and Canada agreed that the effects of a major spill would be significant.[80] Gitxaała's leaders and community members explained how the risk of a major marine spill had been significantly underestimated by NGP and how proposed

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[73] Gitxaała TUS, D72-12-03, pdf page 35; D72-12-07, pdf pages 9-10 [GCR Vol 2, Tab 19, p 820,876-877]; Clarke Affidavit, Ex B, Doc # 118, pdf page 2151 [GCR Vol 4, Tab 63, p 1351].
[74] TR Vol 28, paras 17496-17498, 17505 [GCR Vol 2, Tab 12, p 665-666].
[75] TR Vol 27, paras 17068, 17097, 17099 [GCR Vol 2, Tab 11, p 616, 619]; TR Vol 29, paras 19094 and 19908-19918 [GCR Vol 2, Tab 13, p 707, 710-711].
[76] *Risk Aversion and Lay Assessment in Oil Spill Accidents* ("Bigano Report"), D72-30-2, pdf pages 12-15 [GCR Vol 3, Tab 24, p 894-897]; *Environmental Risk From Enbridge Gateway As An Impact To Gitxaała Nation Use Of Lands, Waters And Resources For Traditional Purposes* ("Firelight Risk Report"), D72-28-3, pdf pages 1-5 [GCR Vol 3, Tab 26, p 15-19]; TR Vol 28, para 17757 [GCR Vol 2, Tab 12, p 676].
[77] TR Vol 26, paras 16285, 16508-16509 [GCR Vol 2, Tab 10, p 595, 604-605]; TR Vol 27, paras 17064, 17095, 17102-17106 [GCR Vol 2, Tab 11, p 616, 619-620]; *Expert Opinion on Petroleum Tanker Accidents and Malfunctions in Browning Entrance and Principe Channel* ("Science Report"), D72-32-07, pdf pages 37-38 [GCR Vol 3, Tab 27, p 914-915]; *Susceptibility of Diluted Bitumen Products from the Alberta Tar Sands to Sinking in Water* ("Short Report"), D72-80-2, pdf page 13 [GCR Vol 3, Tab 28, p 919]; Spencer Statement, pdf pages 13-14 [GCR Vol 2, Tab 7, p 562-563]; Hill Statement, pdf page 10 [GCR Vol 2, Tab 8, p 573]; Firelight Risk Report, pdf pages 5-8 [GCR Vol 3, Tab 26, p 19-22].
[78] TR Vol 26, paras 16281, 16290 [GCR Vol 2, Tab 10, p 595]; TR Vol 28, paras 17433-17436 [GCR Vol 2, Tab 12, p 659-660].
[79] TR Vol 27, paras 17076, 17374 [GCR Vol 2, Tab 11, p 617, 624]; TR Vol 28, paras 17481, 17768-17770 [GCR Vol 2, Tab 12, p 664, 677-678]; TR Vol 29, paras 18780, 19959-19961, 19965-19969, 19976 [GCR Vol 2, Tab 13, p 703, 713-714].
[80] Clarke Affidavit, Ex B, Doc # 119C, pdf page 2318 [GCR Vol 4, Tab 64, p 1383]; TR Vol 138, paras 8853-8856, 8880-8881 [GCR Vol 3, Tab 31, p 942-943, 945].

response measures were at best unknown, and at worst completely inadequate.[81] Gitxaała explained how the shorelines in their territory would be significantly damaged in the event of a major spill because of the narrow waterways travelled by the tankers[82] and how the strong waves, currents, and tidal action would increase the likelihood of an accident[83] and make it difficult to respond to a spill, especially if the oil sunk or submerged.[84] These concerns were informed by Gitxaała's millennia-long knowledge of their waters as well as experiences with shipping accidents in their territory.[85] On the basis of these unacceptable effects from both routine operations and potential accidents and malfunctions, Gitxaała had to reject the Project.

A.4 Gitxaała could not approve the Project given the incomplete assessment

24. Gitxaała also rejected the Project due to the inadequacy of information. Throughout the JRP process, Gitxaała consistently raised concerns about NGP's failure to assess the effects of the Project on their rights and interests.[86] NGP's application had significant gaps and no comprehensive impacts assessment.[87] In many cases, the information required to conduct the assessment was simply missing.[88] Crucial information was missing about the behaviour of diluted bitumen when spilled (i.e. whether it will sink or float).[89] Other gaps concerned impacts to

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[81] TR Vol 26, para 16299 [GCR Vol 2, Tab 10, p 597]; TR Vol 27, paras 17099-17100, 17362-17365 [GCR Vol 2, Tab 11, p 619 and 623]; TR Vol 28, paras 17760-17762 [GCR Vol 2, Tab 12, p 677]; TR Vol 29, para 19959-19961 [GCR Vol 2, Tab 13, p 713]; TR Vol 175, 28449-28451 [GCR Vol 3, Tab 33, p 952].

[82] TR Vol 27, paras 17083, 17099 [GCR Vol 2, Tab 11, p 618-619].

[83] Gitxaała TUS, D72-12-07, pdf page 1 [GCR Vol 2, Tab 19, p 867]; TR Vol 26, paras 16508-16509 [GCR Vol 2, Tab 10, p 604-5]; TR Vol 28, paras 17751-17753 [GCR Vol 2, Tab 12, p 676]; TR Vol 29, paras 19922-19923 [GCR Vol 2, Tab 13, p 712].

[84] Short Report, pdf page 13 [GCR Vol 3, Tab 28, p 919]; JRP Final Argument, pdf pages 119-124 [GCR Vol 1, Tab 2, p 140-148]; TR Vol 29, para 19939 [GCR Vol 2, Tab 13, p 712-1].

[85] TR Vol 28, paras 17761, 17778 [GCR Vol 2, Tab 12, p 677-679]; TR Vol 43, para 31561 [GCR Vol 2, Tab 15, p 739]; Gitxaała TUS, D72-12-07, pdf pages 1, 3-4 [GCR Vol 2, Tab 19, p 867,869-70].

[86] JRP Final Argument, pdf pages 254-263 [GCR Vol 1, Tab 2, p 275-284]; Clarke Affidavit, Ex B, Doc # 81 [GCR Vol 4, Tab 60]; Moody Affidavit, D72-22-18, pdf pages 2-19; D72-22-19, pdf pages 1-5 [GCR Vol 3, Tab 43, p 1129-1151].

[87] Moody Affidavit, D72-22-12, pdf pages 1-34; D72-22-13, pdf pages 1-13 [GCR Vol 3, Tab 43, p 1082-1128]; Clarke Affidavit, Ex B, Doc # 81 [GCR Vol 4, Tab 60].

[88] JRP Final Argument, pdf pages 40-179 [GCR Vol 1, Tab 2, p 61-200]; Moody Affidavit, D72-22-18, pdf pages 7-11 [GCR Vol 3, Tab 43, p 1134-1138].

[89] JRP Final Argument, pdf pages 86-90, 92-109 [GCR Vol 1, Tab 2, p 107-111, 113-130]; JRP Report Submissions [GCR Vol 2, Tab 5, pp 422-434]; Written Evidence Submission of Environment Canada to the Joint Review Panel, E9-6-32, pdf pages 19-20 [GCR Vol 3, Tab 29, p 921-922]; Science Report, D72-32-05, pdf pages 18-19, D72-32-07, pdf pages 16-19 [GCR Vol 3, Tab 27, pp 910-911, 912-915]; Short Report, D72-80-2, pdf pages 2-3, 13 [GCR Vol 3, Tab 28, pp 917-919]; Transcript of cross examination of Clarence Innis by NGP, 2 April 2015 ("Innis Cross Exam"), pdf

fishing and harvesting activities; noise effects on fish; a proper risk assessment in relation to accidents and malfunctions; effects to sensitive habitats and species; emergency response planning; and proposed mitigation measures.[90] NGP persistently refused to address the issues that Gitxaała raised.[91] NGP also declined to incorporate the information from Gitxaała's Use Study into its application.[92] NGP proposed a Fisheries Liaison Committee ("FLC") to mitigate effects to Gitxaała from routine operations.[93] However, the information provided about the FLC – such as its funding, structure or authority – was completely insufficient to assess its effectiveness as a mitigation tool.[94] Without this information, it was impossible to assess the true impacts of the Project on Gitxaała and their ability to exercise Aboriginal rights.

25. Part of Gitxaała's decision-making involved seeking advice from various experts about the potential impacts of the Project.[95] This advice confirmed there were significant gaps in NGP's proposal, that the effects assessment was incomplete including the risk assessment, that NGP's ability to respond to a marine spill was still largely unknown; and that no one had meaningfully assessed Gitxaała's rights and how they would be affected by the Project.[96]

A.5 Canada did not challenge Gitxaała's evidence in the JRP process

26. During the JRP process Canada did not respond to any of Gitxaała's evidence, including their evidence of Title and Governance Rights. Canada did not

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page 20, paras 4-20 [GCR Vol 4, Tab 68, p 1420]; TR Vol 175, para 28195, 28587-28591 [GCR Vol 3, Tab 33, pp 951, 953-954].

[90] JRP Final Argument, pdf pages 40-179 [GCR Vol 1, Tab 2, p 61-200] regarding gaps on impacts to fishing and harvesting, noise effects, risk assessment, sensitive habitats and species, emergency response planning, and mitigation. See Moody Affidavit, D72-22-18, pdf pages 2-19; D72-22-19, pdf pages 1-5 [GCR Vol 3, Tab 44, p 1129-1151]. On risk assessment see Chichilnisky Report, pdf pages 14-15 [GCR Vol 3, Tab 25, p 899-900].

[91] Gitxaała Final Oral Argument, TR Vol 178, p 65, paras 2801-2803 [GCR Vol 1, Tab 4, p 352].

[92] Gitxaała Final Oral Argument, TR Vol 178, p 66-68, paras 2808-2811, 2818-2819 [GCR Vol 1, Tab 4, p 353-355].

[93] NGP Application: Vol 8B, B3-34, pdf pages 59, 65, 70. [ER, Tab 33 (Schedule A)]

[94] TR Vol 115, paras 15053-15186 [GCR Vol 3, Tab 30, p 925-940]; JRP Final Argument, pdf pages 168-176 [GCR Vol 1, Tab 2, p 189-197].

[95] Gitxaała provided expert reports on topics such as aboriginal rights, including title and self-governance, safety and navigation, risk assessment methodology, oil spill modelling, and the fate and behaviour of spilled diluted bitumen. See Bigano Report; Chichilnisky Report, D72-27-2; Conacher Affidavit; Firelight Risk Report; Harris Report; Gitxaała TUS; Marsden Report; Mattson Affidavit; Menzies Report; *Northern Gateway Pipeline's Assessment of Effects on Gitxaała Nation Cultural Rights and Interests, Including Use and Occupancy*, D72-28-2; Bergin Report; Science Report; Short Report.

[96] JRP Final Argument, pdf pages 40-179 [GCR Vol 1, Tab 2, p 61-200].

make Information Requests or cross-examine Gitxaała's Aboriginal rights evidence. Canada also did not advance any contrary evidence or advise of any insufficiencies in Gitxaała's claims of Title and Governance Rights.[97]

B. The JRP recommended approval of the Project

27. The JRP delivered its report recommending approval of the Project subject to a number of conditions.[98] The JRP Report was profoundly flawed.[99] Among other concerns, Gitxaała had urged the JRP to assess the adequacy of Crown consultation up to the point of the JRP hearings, assess the strength of Gitxaała's claim to Title and Governance Rights, and evaluate the seriousness of the impact of the Project on these rights.[100] The JRP's assessment of the Project did none of these.

28. The JRP did not address or consider Gitxaała's Title and Governance Rights, spiritual or cultural rights, or their evidence in relation to impacts on and infringement of these rights. The only assessment the JRP performed, following NGP's methodology, was consideration of biophysical effects of the Project on particular species that are harvested by Aboriginal groups. The JRP did not assess the adequacy of Crown consultation in making its public interest assessment.[101]

29. The JRP deferred important aspects of the environmental assessment of the Project to future approval by the NEB, including Gitxaała's concerns about operational issues and conflicts between vessel traffic and the exercise of harvesting rights. The JRP imposed a condition that the FLC (proposed by NGP) be created to manage those conflicts, without describing any meaningful powers or role for that body, including who would be on it, who would pay for it, what ability it would have to make decisions or how it would resolve disputes. The assessment and approval of the FLC was expressly delegated to the NEB.[102]

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[97] Transcript of cross examination of Jim Clarke by Gitxaała Nation, 1 April 2015 ("Clarke Cross"), pdf pages 20-21, 24, 26, 31-33, 59, paras 97-99, 118, 126-127, 153-161, 163-166, 282 [GCR Vol 4, Tab 69, p 1440-1441, 1444, 1446, 1451-3, 1479].

[98] AF, p 13, 55.

[99] A summary of the flaws in the JRP report has been articulated by Gitxaała on various occasions, including in the JRP Report Submission [GCR Vol 1, Tab 5]. Gitxaała relies on the memorandum of Haisla in relation to the argument that the JRP failed to assess the significance of adverse effects on Aboriginal rights (Issue B.4). Gitxaała relies on the memoranda of the Coalition (Issue 4) and Haisla (Issue F) for the argument that the JRP failed to provide adequate reasons.

[100] JRP Final Submissions, pdf pages 276-280 [GCR Vol 1, Tab 2, p 297-301]. See Error #4 below.

[101] CB Vol 2, Tab 21, p 480, 745-746.

[102] CB Vol 2, Tab 21, p 812-813, 825.

30. The JRP viewed concerns about oil spills as mitigated by the development of emergency response plans, which were not before the JRP or GIC, and were left entirely until later, to be approved by the NEB.[103] An issue of major concern during the hearings was how diluted bitumen would behave in the event of a spill. The answer has a profound impact on the assessment of the effects of the Project, and the approach to and effectiveness of any response operations, and was not resolved at the hearings.[104] The JRP assumed that diluted bitumen would float in spite of the significant uncertainty surrounding the matter, but required that research be undertaken on the question after the JRP and GIC approvals, with the plan for addressing such a spill to be submitted to the NEB for approval.[105]

31. The JRP recommended the Project be found to be in the public interest, concluding that "Canadians would be better off with this Project than without it".[106] In doing so, the JRP did not assess impacts to Title and Governance Rights, and did not consider the public interest in reconciliation with First Nations.[107]

C. Phase IV consultation did not engage with Gitxaała's concerns

32. Based on Canada's representations, Gitxaała understood that concerns and issues left outstanding by the JRP process would be addressed by Canada in Phase IV consultations.[108] However, despite the fact that the JRP did not deal with any impacts on Gitxaała's Title and Governance Rights, Canada limited Phase IV consultations to a discussion of the conditions proposed by the JRP or any additional conditions.[109] No meaningful engagement was offered or provided on the impacts of the Project on Gitxaała's rights or on Gitxaała's many outstanding concerns.

33. Canada also limited consultation to issues related to subsistence harvesting rights and refused repeated requests to consult with respect to Title and Governance Rights.[110] Despite repeated requests, Canada declined to provide its assessment of the strength of Gitxaała's claim to Title and Governance Rights and only stated that

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[103] CB Vol 2, Tab 21, p 807, 819, 822, 829-830.
[104] CB Vol 2, Tab 21, p 607; TR Vol 175, para 28587 [GCR Vol 3, Tab 33, p 953-954]; JRP Final Argument, pdf pages 92-109 [GCR Vol 1, Tab 2, p 113-130].
[105] CB Vol 2, Tab 21, p 827-828, 830-831, 835.
[106] CB Vol 2, Tab 21, p 440, 452.
[107] CB Vol 2, Tab 21, p 447-452.
[108] See footnote 18.
[109] Clarke Affidavit, Ex B, Doc # 116, pdf page 2098; Ex B, Doc # 119C, pdf page 2266 [GCR Vol 4, Tab 61, p 1298; Tab 64, p 1373]; Ex J, Doc # 74, pdf page 916 [GCR Vol 4, Tab 67, p 1416].
[110] Clarke Affidavit, Ex B, Doc # 119C, pdf pages 2291-2293 [GCR Vol 4, Tab 64, p 1378-1380]; MB Vol 2, Tab 31, p 353.

Gitxaała has a strong claim to subsistence harvesting rights.[111] Canada similarly ignored Gitxaała's repeated requests for impacts assessments on Title and Governance rights as well as cultural and spiritual rights.[112]

34. Throughout the process, Gitxaała took numerous steps to provide a reasoned explanation of their decision, including by providing evidence establishing the basis for their rights claims; their specific concerns relating to the Project and Canada's review process; the cultural basis for their concerns; and suggestions for how these concerns could be addressed.[113]

35. At Phase IV, Canada did not make any inquiries about Gitxaała's evidence and submissions concerning Title and Governance Rights. It is not clear whether Canada even read the evidence provided by Gitxaała about their Title and Governance Rights.[114] Canada provided no contrary evidence and raised no insufficiencies in Gitxaała's claim for Aboriginal title, and at no point suggested that any other Aboriginal group occupied – or even used – the Core Claim Area.[115] Indeed, by acknowledging Gitxaała's strong *prima facie* claim for fishing, hunting and other harvesting rights in the Core Claim Area, Canada appears to have accepted Gitxaała's extensive use of the area.

36. Canada's own evidence demonstrates that Canada refused to consult about Aboriginal title. A table used by Canada to track consultation issues, provided for the first time in Canada's affidavit in these proceedings, disclosed a boilerplate response to all Aboriginal title claims saying that the government "acknowledged" the issue but that claims of title and self-government were to be addressed in the context of treaty negotiations (in which Gitxaała does not participate for principled reasons).[116]

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[111] Innis Affidavit, Ex 55, pdf pages 1005; Clarke Cross, pdf pages 26-27, paras 128-132 [GCR Vol 4, Tab 69, p 1446-1447]; Innis Affidavit, Ex 57, pdf pages 1029-1030 [GCR Vol 3, Tab 54, p 1224-1225].

[112] Moody Affidavit, D72-22-04, pdf page 12 [GCR Vol 3, Tab 41, p 1064]; Innis Affidavit, Ex 55, pdf pages 1005-1006 [GCR Vol 3, Tab 53, p 1202-1203]; Clarke Affidavit, Ex B, Doc 119C, pdf page 2340 [GCR Vol 4, Tab 64, p 1384].

[113] For an explanation of Gitxaała's decision, see TR Vol 26, paras 16254, 16299 [GCR Vol 2, Tab 10, p 592]. For an explanation of the basis of Gitxaała's rights claims and specific concerns relating to the Project, see JRP Final Argument, pdf pages 191-214, 228-254 [GCR Vol 1, Tab 2, p 212-235, 249-575]. For suggestions on how Gitxaała's concerns could be addressed, see Gitxaała First Nation Comments on Proposed Terms and Conditions, D72-92-4 [GCR Vol 1, Tab 3]; Clark Affidavit, Ex B, Doc # 81 [GCR Vol 4, Tab 60]; Gitxaała Response to JRP IR No 1, D72-47-2 [GCR Vol 1, Tab 1].

[114] Clarke Cross, pdf pages 10-12, paras 40-53 [GCR Vol 4, Tab 69, p 1430-32].

[115] See footnote 97.

[116] Clarke Affidavit, Ex B, Doc # 133, pdf pages 3046-3047, 3231-3233 [GCR Vol 4, Tab 66, p 1403-1408]; AF, p 18, para 79; Gitxaała TUS, D72-12-03, pdf page 14 [GCR Vol 2, Tab 19, p 805]; TR

Canada's position on this issue was summarized by Mr. Clarke in cross-examination, stating that the review process "doesn't have the capacity to deal with issues of title".[117]

37. The foregoing is consistent with the evidence throughout the record that every agency of Canada that Gitxaała dealt with for the purpose of consultation would not – and could not – deal with the central issues raised in the course of consultation: Gitxaała's Title and Governance Rights and the impact of imposing the Project contrary to Gitxaała's exercise of those rights. Canada consistently limited any consultation to the impact of regular operations on harvesting rights, and to discussion of Project conditions that had been approved without critical engagement of the effects of the Project on Gitxaała's Title and Governance Rights.

38. Canada refused to consider the potential for infringement, though Gitxaała advanced this concern from the very beginning of the process.[118] Canada has not engaged with Gitxaała on this issue, has not provided any response to Gitxaała's concerns about this issue, has not provided any response to Gitxaała's extensive evidence about this issue, and has not met the duty to consult Gitxaała about the effects of the Project on their rights.[119] Nor did Canada attempt to elicit Gitxaała's consent to the Project, despite the fact Gitxaała has raised their concerns about Title since the beginning of the process.[120]

39. Throughout the process, Gitxaała made it clear that they are willing to engage in consultation and work with the Crown to clarify their concerns, delineate their rights and fill information gaps, and, as those gaps are filled, reconsider their

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Vol 28, paras 17734-17745 [GCR Vol 2, Tab 12, p 673-675]. On the inappropriateness of deferring all title and governance issues to the treaty process, see *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154, [2015] BCJ No 694 at para 76; *Xeni Gwet'in First Nations v British Columbia*, 3 BCLR (4th) 231, 2002 BCCA 434 at paras 134-136; *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II. Doc. 51 corr. 1 at para 37

[117] Clarke Cross, pdf page 55, para 270 [GCR Vol 4, Tab 69, p 1475].

[118] Moody Affidavit, D72-22-02, pdf page 10 [GCR Vol 3, Tab 38, p 1045]; Clarke Affidavit, Ex B, Doc # 116, pdf page 2093; Ex B, Doc # 119C, pdf page 2258.

[119] Clarke Affidavit, Ex B, Doc # 116, pdf page 2093; Ex B, Doc # 119C, pdf page 2258; Ex B, Doc # 133, pdf pages 3040-3042 [GCR Vol 4, Tab 61, p 1293; Tab 64, p 1372; Tab 66, p 1403-1408]; Innis Affidavit, Ex 6, pdf page 49 [GCR Vol 3, Tab 45, pdf page 1156].

[120] Clarke Cross, p 16-17, paras 73-75 [GCR Vol 4, Tab 69, p 1436-1437]; *Tsilhqot'in* at paras 73-74.

decision.[121] Gitxaała expected the Crown would reciprocate with a process of respectful consultation designed to address these concerns.

D. The GIC made the Order that the NEB issue the Certificates

40. On June 28, 2014, the GIC issued the Order directing the NEB to issue the Certificates, adopting the JRP's recommendation and conditions.[122] The Order did not comment on the adequacy of consultation with Aboriginal groups or provide justification for the infringement of their rights.[123]

Part II – Points in Issue

41. The GIC and the JRP erred in law and the NEB issued unlawful Certificates as follows:

Error 1: The GIC erred in law by ordering the issuance of the Certificates without consulting Gitxaała respecting their Title and Governance Rights.

Error 2: The GIC erred in law and acted unreasonably by ordering the issuance of the Certificates without adequately consulting Gitxaała respecting Title and Governance Rights.

Error 3: The GIC erred in law and acted unreasonably by ordering the Certificates to be issued when the record before the GIC disclosed that doing so would unjustifiably infringe Gitxaała's Title and Governance Rights.

Error 4: The JRP and GIC erred in law and acted unreasonably by unlawfully sub-delegating essential aspects of environmental assessment and consultation.

Error 5: The JRP erred in law by failing to perform its mandate to assess the public interest on the basis of relevant considerations.

42. These errors of law and jurisdiction and these unreasonable decisions result in the invalidity of the JRP Report, the Order, and the Certificates.

Part III - Submissions

A. Overview of errors made by the decision makers

43. The errors of the JRP, the GIC and the NEB all relate to a unifying fact: none of them, at any time, has attempted to understand the effects of the Project on Gitxaała's Title and Governance Rights and avoid infringement of those rights.

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[121] Canada's Submission on Gitxaała's Notice of Constitutional Question, E9-55-01, pdf page 17, para 28 [GCR Vol 3, Tab 35, p 1012]; Moody Affidavit, D72-22-13, pdf pages 14-29 [GCR Vol 3, Tab 43A, p 1128-1 to 1128-16].
[122] AF, p 14-15, paras 60-64.
[123] CB Vol 3, Tab 22.

Despite the Constitution, statutory environmental law, the JRP Agreement and other constituting documents, and in spite of the Crown's assurances that an assessment of effects on Gitxaała's rights would form part of the process, none of these government actors has sought to understand Gitxaała's rights or assessed how they would be affected by the approval of the Project. This is a failure of each of the decision makers to perform its constitutional and legal duties and requires this Court's intervention to reverse the decisions approving the Project.

B. Errors #1 and #2: The Crown failed to consult or inadequately consulted with respect to Gitxaała's Title and Governance Rights

B.1. Overview: Consultation on Gitxaała's core interests was denied

44. The duty to consult is a constitutional duty imposed to advance reconciliation between Aboriginal people and the Crown by ensuring that the concerns of First Nations are heard and considered; Aboriginal rights are accounted for in decision making; and interim accommodations and protections for Aboriginal rights are provided where appropriate. The process chosen by Canada for consultation with Gitxaała was doomed to fail at serving these purposes, especially with respect to Gitxaała's concerns for their Title and Governance Rights. The evidence shows that Canada had no intention of understanding Gitxaała's perspective or of talking about Title and Governance Rights, but never advised Gitxaała of that. Canada appears to have decided to approve the Project ahead of any consultation.[124]

45. Consultation[125] at its core "is talking together for mutual understanding," and a two-way street that requires sharing information and the revision of the Crown's position based upon new information provided by the First Nation as consultation proceeds.[126] The Crown must undertake meaningful consultation respecting asserted or proven rights before committing to a course of action or decision that could adversely affect those rights.[127] The existence and depth of consultation depends on

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[124] Innis Affidavit, Ex 63, pdf pages 1195-1202; Ex 69, pdf pages 1341-1343; Ex 77 [GCR Vol 3, Tab 56, p 1241-1248; Tab 57, p 1259-1261; Tab 58B, p 1270-24 and 1270-25]; TR Vol 178, pdf pages 105-106, paras 3095-3104 [GCR Vol 1, Tab 4, pages 362-1 and 362-2].

[125] Gitxaała adopts the Legal Framework for the Duty to Consult and Accommodate and for the applicable standards of review, as set out in the Memorandum of the Applicants Nadleh and Nak'azdli; *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 [*Haida*] at paras 43, 46.

[126] *Haida* at paras 42, 46; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 [*Mikisew Cree*] at para 64.

[127] *Tsilhqot'in* at para 78; *Haida* at paras 35, 46.

the strength of the asserted claim and the significance of the impact.[128] The trigger for the duty to consult is set at a low threshold.[129]

46. Title and Governance Rights are, at their heart, about a First Nation's right to choose to what uses its lands, waters and resources will be put, based upon that First Nation's values and aspirations.[130] These rights are not only impacted by Crown or industry actions that may have biophysical impacts on harvesting – they are impacted by Crown decisions that disregard choices a First Nation makes exercising its Title and Governance Rights. Consultation in respect of lands and waters subject to Title should be directed at obtaining the First Nation's consent and, where that consent cannot be obtained, engaging in consultation appropriate given the assessment of the strength of the claim and the significance of the threatened impact.[131] Where the claim is sufficiently strong and impact sufficiently serious, reasonable accommodation is required.[132]

47. The process implemented by the Crown could not and did not meet the demands of consultation.[133] The JRP could not consult and was limited in its role to considering potential impacts on rights, gathering information and passing it along to Canada for the Phase IV consultation process. When it carried out this function it viewed itself as assessing the biophysical effects of the Project on harvested species and did not address impacts on Title or Governance Rights. In Phase IV, government officials limited themselves to considering the JRP Report and proposed conditions and similarly restricted any discussion of Aboriginal rights to subsistence harvesting. Canada refused to share or discuss any assessment of Gitxaała's Title and Governance Rights and, it appears, in fact did not assess these claims at all.[134] In fact, Canada's officials believed that "environmental assessment is not a tool…to be making specific determinations on rights and title."[135] They sought to redirect discussion of Gitxaała's Title and Governance Rights exclusively into the treaty

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[128] *Haida* at paras 39-45.
[129] *Mikisew Cree* at paras 34, 55; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212, [2008] FCJ No 946 at paras 35, 37.
[130] *Tsilhqot'in* at paras 67, 73-75, 121; *Delgamuukw* at paras 165-169.
[131] *Tsilhqot'in* at para 90.
[132] *Haida* at para 47.
[133] Gitxaała also adopts the arguments of Haisla that the Consultation process was procedurally flawed and that consultation did not address substantive concerns.
[134] Clarke Cross, pdf pages 12-15, 26, 32, paras 54-68, 128-130, 160-161 [GCR Vol 4, Tab 69, page1446, 1452]; Innis Affidavit, Ex 57, pdf pages 1029-1030 [GCR Vol 3, Tab 54, p 1224-1225].
[135] Clarke Cross, pdf pages 56-57, para 278 [GCR Vol 4, Tab 69, p 1477-1478].

process, effectively seeking to bar Gitxaała from protecting these rights through consultation or other means.[136]

48. Canada engaged in a process of consultation that excluded the very thing that Gitxaała most wanted to consult about: their right to decide to what uses their lands and waters will be put. Canada also imposed arbitrary deadlines that provided insufficient time for serious discussion or meaningful accommodation of Gitxaała's right to decide and to expect that decision to be respected.[137] This process was disrespectful and amounted to little more than a chance to "blow off steam."[138]

B.2. The Crown did not assess or discuss Title and Governance Rights or the significance of impacts on those rights

49. The Crown must assess the strength of the claim for the asserted right and the significance of the impact to determine the depth of consultation and the degree of accommodation, if any, required in response to a First Nation's concerns. This also allows the Crown to identify gaps in the information presented, allowing the First Nation an opportunity to address those gaps by providing further information.

50. Gitxaała's evidence demonstrated a strong claim for Title and Governance Rights and showed that Canada's decision to approve the Project constitutes a very serious impact on those rights.[139] The duty to consult concerning Title and Governance Rights was required to be performed at a deep level. Having misconceived both the strength of the claim and the impacts of the decision, the Crown failed to consult regarding Gitxaała's Title and Governance Rights. Any steps taken to satisfy the duty to consult Gitxaała on their Title and Governance Rights cannot be viewed as adequate by any standard.

B.2.1 The record before the Crown demanded deep consultation with respect to Title and Governance Rights

51. The record before the Crown shows that deep consultation with respect to Title and Governance was required.

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[136] Innis Affidavit, Ex 73, pdf page 1376 [GCR Vol 3, Tab 58A, p 1270-18]; Clarke Affidavit, Ex B, Doc # 119C, pdf page 2291-2293, Ex B, Doc # 133, pdf pages 3046-3047, 3231-3233 [GCR Vol 4, Tab 66, p 1403-1408]; Clarke Cross, pdf page 55, para 270 [GCR Vol 4, Tab 69, p 1475]. See also footnote 116.

[137] *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 37 BCLR (4th) 309, 2005 BCCA 128 at para 95, Hall JA, para 103, Lowry JA (concurring); *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 66 BCLR (5th) 137, 2014 BCSC 991 at paras 213-214.

[138] *Mikisew* para 54.

[139] *Gitxaała Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336, [2012] FCJ No 1446 at para 8, 15; *Tsilhqot'in*, para 79; *Haida*, paras 39, 44.

B.2.1.1 Gitxaała's record establishes a strong claim for Aboriginal title

52. A First Nation has Aboriginal title to those lands and waters it exclusively occupied at the time of the assertion of British sovereignty.[140] Occupation is to be assessed both with regard to the perspective of the Aboriginal group and the common law and must take into account the way of life of the First Nation and the character of the lands and waters in question.[141] The common law perspective looks at possession, which is tied to use and effective control.[142] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group and must be given equal weight.[143] Sufficient occupation is demonstrated by a range of indicia, including demonstrating "exclusive stewardship" over the areas in question,[144] but does not require intensive or regular use and can instead be shown by harvesting or uses in specific areas, such as fishing in specific tracts of water; Aboriginal title can be proven on a territorial basis.[145] Current use that is continuous with pre-sovereignty use can be evidence of Aboriginal title.[146] An indigenous legal system of governance and land tenure is evidence of Aboriginal title, as are acts and practices in relation to their territory such as fishing in tracts of water.[147]

53. On the record before the JRP and the GIC, not challenged by any of the Respondents, Gitxaała demonstrated exclusive use and occupancy in the Core Claim Area through evidence of: an established tenure and governance system; regular use of the area for fishing, harvesting and transportation; the naming of places; and the existence of sites of spiritual significance. On the record before this Court, the claimed right is proven.

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[140] *Tsilhqot'in* at paras 25-26, 30; *Delgamuukw* at para 143-144; The date of sovereignty is a legal question based on when the Crown gained effective sovereignty over land; in BC, this is usually 1846. On Aboriginal title to waters, see *Walpole Island First Nation v Canada (Attorney General)*, [2004] OJ No 1970, [2004] 3 CNLR 351 (Ont SC).

[141] *Tsilhqot'in* at paras 31-32, 34-36, 41 49; *Delgamuukw* at paras 84, 112, 147-149, 156-157; *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77 [*Van der Peet*] at paras 49-50.

[142] *Tsilhqot'in* at paras 36-41; *Delgamuukw* at paras 145, 149, 156.

[143] See footnote 141.

[144] *Tsilhqot'in* at para 38-42, 47; *Delgamuukw*, at para 149, 156-157; *R v Marshall; R v Bernard*, [2005] 2 SCR 220, 2005 SCC 43 [*Marshall; Bernard*] at paras 56, 70,

[145] *Tsilhqot'in* at paras 38-44, 50, 56; *Delgamuukw* at para 149; *Marshall; Bernard*, at para 56.

[146] *Delgamuukw per* Lamer CJ at paras 152-154, per La Forest J (concurring) at paras 197-198; *Tsilhqot'in* at paras 45-46; *Van der Peet* at para 63.

[147] *Delgamuukw* at paras 94, 102-106 and 148; *Tsilhqotin* at paras 37-41. The rights proven by Gitxaała, including those acknowledged by Canada such as subsistence harvesting rights are activities that evidence title: Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press 1989) at 198-200; *R v Marshall*, 2003 NSCA 105 at paras 135-138.

54. Gitxaała's continued presence in and use of the Core Claim Area since long before contact with Europeans or the assertion of British sovereignty is undisputed. This conclusion is supported by the ethnographic record; the oral history of the Tsimshian; the archeological record, and the historic documentary record.[148] Similarly, the exclusivity of Gitxaała's presence in and use of the Core Claim Area is unquestioned on the record. The ethnographic record clearly identifies this as exclusively Gitxaała territory and records Gitxaała's actions to defend that territory.[149] There is no evidence in the record led by any intervenor before the JRP of any claim to this area by any other First Nation. Therefore the sole issue in respect of Title is whether the occupation is sufficient to establish Aboriginal title.

55. The extensive evidence of Title to the Core Claim Area has been reviewed in detail above in a number of categories: the fact that Gitxaała had a governance system that covered all of the lands and waters of the territory, including the Core Claim Area; the use of the Core Claim Area for regular resource harvesting, including fishing in the waters, harvesting of sea plants and shell fish in the inter-tidal zone and the hunting of sea mammals; numerous permanent villages and camps (many of which are now reserves) in the Core Claim Area; the existence of a large number of Gitxaała place names in the Core Claim Area; the presence of a large number of spiritual sites associated with the *naxnox* in the Core Claim Area; and that Principe Channel and Mink Trap Bay were both important waterways for accessing the territory. The presence of the *naxnox* is of special significance in that the *naxnox* represent the source of the governance powers of the *Sm'gigyet*, the resources harvested by Gitxaała, and thus the structure of their society and culture.

56. The harvesting evidence is also of great importance as it shows that for the core Gitxaała community living at *Lach Klan*, between 70%-90% of their food comes from harvesting, and even those living in Prince Rupert rely heavily on the ability to harvest.[150] Both Principe Channel and Mink Trap Bay – the site of a proposed back-up anchorage for NGP – feature prominently in this evidence.[151]

57. Taken as a whole, the evidence proves Gitxaała's Title, given the extent and nature of their use of the lands and waters and the resources they provide. The

[148] See paras 8, 11-12, 14-15.
[149] See paras 9-12, 18.
[150] See footnote 52.
[151] Spencer Statement, pdf page 6 [GCR Vol 2, Tab 7, p 555]; Milton Statement, pdf pages 3-4 [GCR Vol 2, Tab 9, p 576-577]; TR Vol 27, paras 17102-17103 [GCR Vol 2, Tab 11, p 619-620].

evidence shows the Core Claim Area is an area that Gitxaała controls and is of central significance as their homeland: "Plain and simple, this is our place in the world."[152]

B.2.1.2 The record establishes a strong claim for Governance Rights

58. Aboriginal rights require proof of pre-contact practices, traditions or customs that are integral to the distinctive culture of the Aboriginal group.[153] The courts have recognized the potential for an Aboriginal right of self-government in respect of the lands and resources of a First Nation, but have not yet articulated the test for such a right.[154] Where a First Nation can show the existence of a system of governance over its territory that was integral to the distinct pre-contact culture of the First Nation, it establishes the essential elements of a right to govern those lands and resources. The existence of an Aboriginal system of governance may also prove exclusivity of occupation, and support the recognition of related Aboriginal rights. Assessment of governance rights, a particularly defining category of right, requires special attention to the unique features of the people who claim these rights.[155]

59. Gitxaała's Governance Right includes Gitxaała's authority, through their *Sm'gigyet* and irrespective of any determination of Aboriginal title, to decide to what use the lands, waters and resources of their territories will be put and by whom. The record proves that the governance system in which that authority is enacted is a custom, practice and tradition integral to the distinct culture of Gitxaała, constituting an Aboriginal right.

60. Gitxaała led evidence of experts and community members proving the profound importance of Gitxaała's governance system. This evidence before the JRP exhibits a wide range of governance matters including: ownership of resources; control over access to resources; the consequences of accessing resources contrary to the wishes of the appropriate persons; and how resources are passed from one

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[152] TR Vol 28, para 17766 [GCR Vol 2, Tab 12, p 639].

[153] *Van der Peet* at para 46; *R v Sappier; R v Gray*, [2006] 2 SCR 686, 2006 SCC 54, at para 20; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, [2011] 3 SCR 535, 2011 SCC 56 at para 46.

[154] Gitxaała adopts the submissions and authorities referred to by Nadleh and Nak'azdli regarding Governance Rights being cognizable at law. See also *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*] at para 27; *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123, [2000] BCJ No 1524 at paras 180-181; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, [1973] SCJ No 56 *per* Judson J at 328, *per* Hall J at 383; *Van der Peet* at paras 30-43.

[155] *Pamajewon* at paras 23-25; *Van der Peet* at paras 30-31, 46, 49-50, 55-59, 69, 71, 74; *Tsilhqot'in* at paras 33-44.

generation to the next.[156] This system influences who a person can marry and determines their status in the community, and failing to act in accordance with this system – especially by a *Sm'gigyet* – erodes the status and rank of a *Sm'gigyet* and his House. This system is of central significance to the very identity of Gitxaała as a distinct people and as such supports the existence of an Aboriginal right to govern the lands and resources making up the *Sm'gigyets'* collective, *galüünx*. This right includes the right to govern who can access the waters of Principe Channel and Mink Trap Bay.

B.2.1.3 The Crown's decisions significantly impact Title and Governance Rights

61. Based on a range of factors, Gitxaała made a choice not to approve the use of their territory for shipment of bitumen and condensate.[157] Their decision was not made lightly. It reflects the consensus of not only the hereditary leadership but also the elected leadership and the membership at large, ranging from elders to youth, including members living at *Lach Klan* and those living elsewhere.

62. The impact of the Crown's disregard of Gitxaała's decision is very significant. It negates a decision made respecting the heart of Gitxaała's territory, over an extended area and extended time; it is not a single, isolated or transient intrusion onto the nation's ability to control their territory. The Crown's decision will affect Gitxaała for decades, given that the expected lifespan of the Project is in the order of 50 years. It will affect Gitxaała repeatedly, with 190 to 250 tanker calls made to the Kitimat Terminal annually, consisting of approximately 70 calls by condensate tankers and 150 calls by oil tankers.[158] Every day and throughout their territory, Gitxaała will be confronted with Canada's decision to disregard their choice.[159] The Crown's decision is also significant in its permanence, as it will be close to impossible for the Crown to reconsider or reverse.

63. The decision is also culturally offensive to Gitxaała. The Project would fall within the concept of *hawalk* given the impacts it would have on the environment, the disrespect it shows to the *naxnox* and Gitxaała's resources, and the profound risk it places on Gitxaała's future.[160]

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[156] See paras 10-12, 14, 19.
[157] See paras 3, 20-25.
[158] AF, p 2, para 4.
[159] TR Vol 28, para 17757 [GCR Vol 2, Tab 12, p 676].
[160] See para 19.

64. The Crown's approach of delegating assessment of important matters to an entity that does not carry out the duty to consult (the NEB) also deprives Gitxaała of any future opportunity to have a meaningful say in crucial parts of the Project's assessment, including whether the risks, when finally determined, could be seen to be in the public interest. Together these factors mean the Order and the Certificates have very significant impacts on Gitxaała's Title and Governance Rights.

B.2.2 The failure to assess the strength of claim and the significance of impact is a serious breach of the duty to consult

65. The JRP did not have the power to assess Gitxaała's strength of claim to Title and Governance Rights and failed to consider or assess the significance of any impact to those rights. Despite repeated requests, the government officials charged with conducting consultation did not assess the strength of Gitxaała's claim, nor was Gitxaała provided with a strength of claim assessment with respect to Title and Governance Rights by any agency within government.[161] The evidence is unequivocal that no assessment of Title and Governance Rights or impacts on those rights was ever communicated to Gitxaała. The extensive record filed by the Crown discloses no assessment of Gitxaała's claim to Title and Governance Rights.[162] This is consistent with the Crown's steadfast refusal to even discuss these rights. The Crown limited its assessment of Aboriginal rights and the scope of its consultation to subsistence harvesting rights (for which it acknowledged a strong *prima facie* claim).

66. The failure to assess the strength of the claim for Title and Governance Rights constitutes an error of law and is unreasonable. Given the strength of the claim disclosed on the record, this failure is very serious and undermined consultation with Gitxaała entirely. Canada approached consultation with a profound misconception of the issues at stake and the significance of those issues. Rather than enhancing the process of reconciliation, Canada's approach to consultation frustrated it by ignoring Gitxaała's concerns and minimizing their rights as being merely subsistence harvesting rights for which only "biophysical effects" would be considered.

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[161] Moody Affidavit, D72-22-02, pdf page 11[GCR Vol 3, Tab 38, p 1046]; D72-22-04, pdf page 19 [GCR Vol 3, Tab 42, p 1071]; D72-22-13, pdf pages 17-18 [GCR Vol 3, Tab 43A, p 1128-4 and 1128-5]; Innis Affidavit, Ex 6, pdf pages 45-48; Ex 11; Ex, 20, pdf pages 99-100; Ex 22, pdf pages 171-172; Ex 50, pdf pages 981-982; Ex 55, pdf page 1006 [GCR Vol 3, Tab 45, p 1152-1155; Tab 47, p 1164-1165; Tab 51, p 1189-1190; Tab 49, p 1172-1173; Tab 53, p 1201].

[162] Clarke Cross, pdf pages 18, 26-27, paras 83, 129-132 [GCR Vol 4, Tab 69, p 1438, 1446-7].

67. In the course of consultation, Canada's officials suggested they were taking Gitxaała's claims of rights at "face value" or as proven without assessment.[163] Were this true respecting title, the Crown would have had to consult with a view to seeking and obtaining consent – as is required where title is confirmed by order *or* agreement.[164] No attempt was made to seek consent and the evidence indicates Canada's true position was that Aboriginal title had to be dealt with in treaty negotiations.[165]

B.3 The Crown did not consult in good faith

68. Honourable consultation must be carried out in good faith with a genuine intention of addressing a First Nation's legitimate concerns. It must be more than an opportunity to blow off steam and has to involve, at least, a genuine exchange of information, an open mind on the part of the Crown, serious consideration of the information provided by a First Nation and, where appropriate, willingness to change course and accommodate Aboriginal rights.[166] The record shows that the Crown had no such intention here, especially with respect to Title and Governance Rights and Gitxaała's perspective on how their rights would be affected.

69. The Crown's engagement in Phase IV demonstrated no willingness to discuss Gitxaała's claims or their concerns. Canada failed, despite repeated requests, to provide a formal strength of claim assessment or comment upon the strength of Gitxaała's claims. Canada did not ask any questions about the evidence or submissions Gitxaała made in support of their claim for Title and Governance Rights and did not request further information, and did not share any evidence that would cast doubt on Gitxaała's claims – nor did it point to contrary evidence. Canada held the view that the treaty process was the place where title issues should be addressed.[167] It took this view despite ongoing assurances to Gitxaała that rights and title would be addressed in this process.[168] Canada's approach to Title and Governance Rights was to not acknowledge them, understand them, or deal with

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[163] Clarke Affidavit, Ex B, Doc # 116, pdf page 2098; Ex B, Doc # 117, pdf page 2108; Ex B, Doc # 119C, pdf page 2267, 2282, 2291 [GCR Vol 4, Tab 61, p 1298; Tab 62, p 1308; Tab 64 pages 1374, 1377-1378].
[164] *Tsilhoqt'in* at paras 76, 88-92, 97; *Delgamuukw* at para 168.
[165] Innis Affidavit, Ex 73, pdf page 1376 [GCR Vol 3, Tab 58A, p 1270-18]; Clarke Affidavit, Ex B, Doc # 133, pdf pages 3231-3233 [GCR Vol 4, Tab 66, p 1405-1408]; Clarke Cross, para 270 (pdf page 55) [GCR Vol 4, Tab 69, p 1475].
[166] *Haida* at paras 42, 46; *Delgamuukw* at para 168; *Mikisew* at paras 54-55.
[167] See footnote 136.
[168] See footnote 18.

them at all. As such, there was no chance of engagement or accommodation from the outset.

70. In cross-examination, the Crown's lead representative in Phase IV was unable to answer if anyone had even read the key expert evidence that Gitxaała diligently and meticulously presented (as requested by Canada). At best, Mr. Clarke speculated that someone in another department had done so. Merely reading or listening to a submission is not sufficient to evidence good faith engagement if it is done in a *pro forma* fashion or with a closed mind; such conduct renders a right to make submissions meaningless.[169] Here, Canada did not provide evidence that it met the threshold of having read and considered Gitxaała's evidence of Title and Governance Rights at all or other than in a *pro forma* fashion.[170] The record reveals that Canada "presumed" a good case for subsistence harvesting rights then focused the consultation on the biophysical effects on those rights to the exclusion of any consideration of Title and Governance Rights.

71. The consultation process was overshadowed by indications that Canada had pre-determined the outcome, so consultation would have provided no meaningful chance to contribute to the process. Very early in the process, Joe Oliver, then Federal cabinet minister responsible for Natural Resources, stated in public that the Project was in the national interest.[171] The subsequent adoption of a process that excluded any real consideration of Title and Governance Rights is consistent with this pre-determination of the central issue. Modifying the NEB's powers mid-process to give the final decision-making power to cabinet is also consistent with the Crown's desire to reach a particular result. All of this weighs heavily against the consultation process being in good faith where the Crown comes with an open mind, not with a view to persuade but with a view to listen.[172]

B.4 Canada failed to discharge its duty to consult Gitxaała

72. Gitxaała has established a strong claim to Title and Governance Rights and that the impacts of the Project on those rights are serious. By ignoring these rights, Canada foreclosed any meaningful consultation or accommodation of them. Gitxaała participated fully, despite its reservations, in a process the Crown promised would

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[169] *Ontario (Attorney General) v Fraser*, [2011] 2 SCR 3, 2011 SCC 20 at para 103.
[170] Clarke Cross, paras 40-53 (pdf pages 10-12) [GCR Vol 4, Tab 69, p 1430-1432].
[171] Innis Affidavit, Ex 77 [GCR Vol 3, Tab 58B, p 1270-24 and 1270-25]. See also note 124.
[172] *Haida Nation* at para 46.

provide engagement on their rights; that engagement never happened. Accordingly, the Crown has breached the constitutional duty to consult and the Order and Certificates must be set aside.

C. Error #3: The Order and Certificates infringe Gitxaała's Title and Governance Rights

73. Gitxaała's Title and Governance Rights are infringed by the Project approvals in the Core Claim Area.[173] The Order and Certificates interfere with Gitxaała's jurisdiction and control over the lands and waters in the Core Claim Area by authorizing the Project without Gitxaała's consent and contrary to their express wishes made by considered judgment. The Crown thereby infringed Gitxaała's right to govern their lands and waters and determine the uses to which they are put.[174] The Order and Certificates also permit future infringements that will occur with each tanker transit that is permitted to traverse Gitxaała's territory.

74. Whether the Order infringed Gitxaała's rights and permitted future infringement of those rights, and whether the Certificates infringe Gitxaała's rights, are questions of constitutional law reviewable on a standard of correctness.[175]

C.1 The GIC and NEB cannot unjustifiably infringe Title and Governance Rights

75. Decision makers are limited in their exercise of statutory powers by s. 35(1) of the *Constitution Act, 1982*, which requires that activities authorized by applicable legislation must not unjustifiably infringe Aboriginal rights.[176] The conduct of the GIC and NEB is therefore subject to the test for whether a s. 35 right has been unjustifiably infringed, which asks: (1) whether the claimed right has been established; (2) whether the claimed right has been extinguished; (3) whether the claimed right has been *prima facie* infringed; and (4) whether the *prima facie* infringement can be justified.[177]

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[173] Innis Affidavit, Ex 70, pdf pages 1345-1352 [GCR Vol 3, Tab 58, p 1263-1269]. Gitxaała does not seek a declaration of title in these proceedings. See footnote 3.
[174] *Tsilhqot'in* at para 73. See paras 20-23, 53-55, 59-62 ; Innis Affidavit, Ex 70, pdf page 1345-1352.
[175] Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell 2014) (looseleaf updated December 2014), ch 15 at 18; *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 2008 SCC 9 at para 58.
[176] *Quebec (Attorney General)* at para 40; Slaight (QL) at para 87 per Lamer J (dissenting); *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 at para 45.
[177] *R v Gladstone*, [1996] 2 SCR 723, [1996] SCJ No 79 at para 20; *Tsilhqot'in* at para 13.

76. The burden of proving a right and its infringement lie with the First Nation,[178] while the burden of proving extinguishment[179] or justification lie with the Crown.[180] At no point in the process has any Respondent alleged extinguishment. There was an extended hearing process before a body mandated to receive evidence of effects on s. 35 rights, such evidence was adduced, and an opportunity was afforded to Canada, British Columbia and NGP as intervenors to cross-examine on that evidence, oppose it or introduce competing evidence. They did not do so. The question of infringement should be determined on the record before the Court.

C.1.1 The claimed rights are established on the record

77. As set out above in the analysis of the strength of Gitxaała's claims in the consultation context, the evidence before the JRP and GIC establishes that Gitxaała holds Title and Governance Rights in the Core Claim Area.[181]

C.1.2 The Order and Certificates give rise to prima facie infringement

78. *Prima facie* infringement occurs when there has been a meaningful diminution of the Aboriginal right in question, given the characteristics or incidents of the rights at stake.[182] The threshold for *prima facie* infringement is low.[183]

79. The factors relevant to this assessment include: whether the limitation imposed by the legislation is unreasonable; whether the legislation imposes undue hardship; and whether the legislation denies the holders of the right their preferred means of exercising the right.[184] The infringement analysis must account for the incidents of the rights, here including the right to determine to what uses the area subject to the rights may be put.[185]

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[178] *Van der Peet* at para 46; *R v Sparrow*, [1990] 1 S.C.R. 1075, [1990] SCJ No 49 (QL) [*Sparrow*] at para 70.
[179] *Sparrow* at para 39.
[180] *Sparrow* at para 65.
[181] The test for Aboriginal title is set out above at para 52. The analysis of how that right has been established in the Core Claim Area is set out in the evidence at paras 9-18 and analysis at paras 53-57. The test for Aboriginal governance rights is set out above at para 58. How Gitxaała has established the right in the Core Claim Area is set out in the evidence at paras 10-12, 19 and the analysis at paras 59-60.
[182] *R v Morris*, [2006] 2 SCR 915, 2006 SCC 59 at para 53; *Gladstone* at para 43; *Tsilhqot'in* at paras 104, 122.
[183] *Gladstone* at para 151; *William v British Columbia*, 2012 BCCA 285, [2012] BCJ No 1302 [*William*] at para 294-295.
[184] *Tsilhqot'in* at para 122, *Sparrow* at para 70.
[185] *Tsilhqot'in* at para 121.

80. The approvals of the Project impair Gitxaała's Title and Governance Rights, as well as their ability to engage in the rights incidental to their title, such as harvesting rights, cultural and spiritual rights.[186]

81. Canada has ignored and negated Gitxaała's decision and in doing so significantly diminished Gitxaała's ability to exercise their rights. For all the reasons discussed above, Canada's infringement is serious because it affects a substantial area at the heart of their territory; it affects Gitxaała's rights frequently and for an extended period of time; and it ignores the deep support for this decision within the Gitxaała community.[187] As such, the Order and the Certificates issued by the NEB are *prima facie* infringements of Gitxaała's Title and Governance Rights.

C.1.3 The infringement is not justified

82. Justification must be assessed in the context of the asserted rights and the specific infringements under consideration.[188] Reconciliation, the honour of the Crown, and the fact that the rights in issue arise from sovereign Aboriginal societies prior to British sovereignty, must all be at the heart of the assessment of justification.[189]

83. To justify a *prima facie* infringement, the Crown must demonstrate: that it discharged its procedural duty to consult and accommodate; that its actions were backed by a compelling and substantial objective; and that the decision is consistent with the Crown's fiduciary obligation to the group.[190] The fiduciary obligation also requires that a relied-upon benefit to the public is proportionate to any adverse effect on the Aboriginal interest at stake.[191]

84. Gitxaała submits the Crown cannot justify the Order and Certificates. The Crown failed to discharge its procedural duty to consult for the reasons set out above in the consultation analysis.[192] This alone is fatal to any attempt on the part of the Crown to justify the infringement. As the trial judge held in *Tsilhqot'in*, the Crown

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[186] See footnote 174.
[187] See paras 3, 20-25, 61; TR Vol 26, para 16249 [GCR Vol 2, Tab 10, page591]; Gitxaała TUS, D72-12-07, pdf page 1. [GCR Vol 2, Tab 19, p 867].
[188] *William* at paras 327-329.
[189] *Tsilhqot'in* at para 82; *Delgamuukw* at para 186.
[190] *Tsilhqot'in* paras 77-88, 125; *Sparrow* at paras 71, 75.
[191] *Tsilhqot'in* at paras 87, 125.
[192] See paras 65-72.

cannot justify infringements of Aboriginal rights where it fails to acknowledge or take into account those rights in its decision making.[193]

85. To justify infringement on the basis of a substantial and compelling public purpose, the broader goal of the government must further the goal of reconciliation, with regard to both the Aboriginal interest and the broader public objective.[194] In the course of the entire process, not one benefit of the Project for Gitxaała was identified. The JRP Report instead remarked that local areas, which would include Gitxaała's territory, would bear the environmental burdens of the Project.[195] The JRP then concluded that Canada was better with the Project than without it.[196] This does not describe a public interest assessment aimed at reconciliation with First Nations.

86. The infringement of Gitxaała's Title and Governance Rights also occurred in a manner that is inconsistent with the Crown's fiduciary duty. The duty requires that the Crown act proportionately and demonstrate the infringement is necessary in order to achieve its substantial and compelling purposes.[197] Here, the environmental assessment process precluded any consideration of whether there are alternative means of attaining the Crown's purpose of achieving economic benefits, without infringing Gitxaała's rights. The environmental assessment was permitted to consider whether there are alternative means of carrying out the Project and its purpose, but was not permitted to consider whether there are alternatives to the Project that would achieve the Crown's objectives underlying the approvals.[198] Instead of making those inquiries in consultation, and attempting to avoid infringement, Canada chose to perform a woefully inadequate process that is detrimental to the honour of the Crown.

87. The Crown's fiduciary duty also indicates that the Crown cannot justify substantially depriving future generations of the benefit of the land.[199] Here the Project gives rise to the potential for an event that could sever the relationship between Gitxaała and part of their territory. The risk of a tanker spill or malfunction

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[193] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, [2007] BCJ No 2465 at para 1294; *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494, [2009] BCJ No 2155 at para 869.
[194] *Tsilhqot'in* at para 82.
[195] JRP Report: Vol 2 [CB Vol 2, Tab 21, p 449].
[196] JRP Report: Vol 2 [CB Vol 2, Tab 21, p 452].
[197] *Tsilhqot'in* at paras 77, 87.
[198] *CEAA, 2012*, s 19(1) (g); JRP Report: Vol 2 [CB Vol 2, Tab 21, p 610]; Panel Session Results and Decision [MB Vol 1, Tab 7, p 141].
[199] *Tsilhqot'in* at para 86.

is not simply a matter of whether there can be an eventual recovery of the natural environment, but whether that recovery will happen in a timely fashion that would allow for Gitxaała to continue to pass on their culture and way of life, and whether the recovery will be to a point where they will be willing and able to use their resources for sustenance and cultural purposes.[200]

88. The analysis of these concerns requires knowing how a spill will actually affect the way in which Gitxaała's rights are exercised and also how effective and reliable response and clean-up operations would be looked at in this light. These concerns were not addressed by the JRP or GIC given their refusal to assess impacts on rights or how rights would be affected beyond assessment of biophysical proxies. Gitxaała's core concerns about risks were not addressed with any regard to their perspective, and the key issue of emergency response was deferred.

89. Here, the risks of harmful effects are borne vastly disproportionately by Gitxaała and other First Nations. The benefits that may flow to Canada as a whole as a result of an entirely speculative adjustment to the GDP cannot outweigh the potential loss of a civilization that is thousands of years old and that has flourished in the waters of the northwest coast of British Columbia since time immemorial.

C.2 The Crown's infringement of Gitxaała's rights threatens their existence

90. Gitxaała advised the Crown repeatedly and throughout the process that if the GIC decides that the NEB must issue the Certificates for the Project, this will infringe and permit further infringements of Gitxaała's rights.[201] Gitxaała has received absolutely no response or comment from the Crown respecting these assertions. The Crown proceeded, paying no heed to these concerns.

91. It is still not apparent at this time that the Crown has understood and grappled with Gitxaała's concerns. It is not apparent that the Crown understands that its actions must be justified, transparent and in line with the honour of the Crown. A central feature of that transparency is understanding the effects of the Crown's decisions on Gitxaała's rights. Instead of acting in the interest of reconciliation, Canada acted in a manner that threatens Gitxaała as a society and culture.

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[200] Firelight Report, pdf pages 5-8, 11 [GCR Vol 3, Tab 26, pp 905-908].

[201] Notice of Constitutional Question (JRP) [CB Vol 3, Tabs 28, 29]; Innis Affidavit, Ex 70, pdf pages 1345-1352 [GCR Vol 3, Tab 58, p 1263-1269]; Clarke Affidavit, Ex A, pdf page 218; Ex B, Doc # 81, 1232 [GCR Vol 1, Tab 6, p 549; Vol 4, Tab 60, p 1283].

D. Error #4: The JRP and GIC improperly delegated their statutory duties

92. Sub-delegation of statutory duties by a decision-maker is presumptively prohibited.[202] The presumption may be overcome where objective "standards, rules and conditions to guide the decision-making process" are disclosed.[203] If delegation is to occur in the context of an environmental assessment, such standards for discretion and supervisory control must be maintained to ensure that environmental protection is performed as required by law.[204] Failing to do so is an abdication of statutory responsibility.[205] The approach taken by the JRP and GIC frustrates *CEAA, 2012*, which requires implementation of mitigation plans to be taken into account in the environmental assessment itself.[206] Instead, the JRP approved the Project first and planned for mitigation of harms later.

D.1 Assessment of effects of a spill and mitigation was sub-delegated to the NEB

93. Parliament assigned the duty of performing an environmental assessment to the JRP.[207] Parliament changed the *NEBA* to take decision-making power away from the NEB, and to ensure the GIC was the political decision-maker responsible for accepting or rejecting the JRP's assessment and recommendation.[208]

94. The JRP concluded that the effects of a major oil spill could be mitigated through emergency response procedures.[209] This conclusion relied on unknowns: the effectiveness of response procedures, the effects of those procedures themselves, and whether the procedures are cost effective. It even assumed despite uncertainty that diluted bitumen would float, impairing the ability to know for the purpose of

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[202] *Morton v Minister of Fisheries and Oceans et al*, 2015 FC 575 [*Morton*], paras 79-80; *Greenpeace Canada v Canada* (Attorney General), 2014 FC 463 at para 244.
[203] *Morton* at para 83 and references therein; *Greenpeace* at para 244.
[204] *Morton* at para 83.
[205] *Morton* at para 83; *Greenpeace* at paras 229-242; *Chief Councillor Matthew Hill (Kitkatla) v. Minister of Small Business, Tourism and Culture (BC) et al*, 61 BCLR (3d) 71, 1998 CanLII 1712 (BCSC), paras 49-50.
[206] *CEAA, 2012*, s 52(4)(a).
[207] Sections 19(1) and 5 of the *CEAA, 2012* and s. 52(2) of the *NEBA* set out the factors that the JRP must consider. See also Amended JRP Agreement [MB Vol 1, Tab 10, p 220-222 , ss 4.1, 6, 8; Amended Hearing Order: List of Issues, [MB Vol 1, Tab 9, p 194-198]; Scope of the Factors, [MB Vol 1, Tab 6].
[208] *NEBA*, s 54; *CEAA, 2012*, s 52, *Greenpeace* at paras 229-238. The *Jobs Act* shifted final decision-making responsibility over the Certificates from the NEB to the GIC, and specified that this new arrangement would apply to the Project. It also specified that the GIC would determine whether the Project was likely to cause significant environmental effects pursuant to s 52(1) of the *CEAA, 2012* [*Jobs Act*, ss 83, 104(2), 104(4)(a)].
[209] JRP Report: Vol 2 [CB Vol 2, Tab 21, p 417].

environmental assessment what kinds of effects could result from a spill at all.[210] The JRP also expected the implementation of the FLC would mitigate conflicts between the operation of tankers and First Nation harvesters. This conclusion relied upon unknown powers of an undefined and non-existent FLC.[211]

95. The JRP and GIC thereby engaged in delegation by approving the Project with conditions that require NGP to address unresolved environmental assessment issues related to both the potential effects of a spill and the effectiveness of mitigation later, and the NEB to then approve those future plans.

D.2 The delegation is improper and the environmental assessment invalid

96. Downloading the assessment of emergency planning;[212] the question of the behaviour and fate of diluted bitumen;[213] and the scope and powers of the FLC[214] to the NEB was improper. No thresholds for approval of emergency plans or standards for certainty around the behaviour of oil were set out, and no objective criteria for approval of the FLC were provided, including matters relevant to whether the FLC actually could accommodate First Nation interests, such as its authority to address routing, timing, and speed of vessels to accommodate harvesting.

97. The assessment of the effectiveness of mitigation measures is a core aspect of environmental assessment.[215] Here the NEB was delegated that task, without any indication of objective standards for how it must be performed. There is no indication in the JRP Report or anywhere in the record as to how performance of the conditions could satisfy environmental assessment standards.[216] The JRP and GIC did not set standards for resolving these matters to a level of satisfaction consistent with the legislation, leaving the NEB with unlimited discretion.[217]

98. The JRP and GIC thereby engaged in delegation of matters central to the question of whether the concerns of Gitxaała and others could be adequately

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[210] The sink or float controversy was critical because NGP premised the Project design on the assumption that the products would float [JRP Report: Vol 1 [CB Vol 1, Tab 20, p 421]; JRP Report: Vol 2 [CB Vol 2, Tab 21, pp 529-540]].
[211] JRP Report: Vol 2 [CB Vol 2, Tab 21, p 711-712].
[212] Conditions 18, 85-88, 117-119, 168-169, 171-172, 174-176, 192 [CB Vol 2, Tab 21, p 807, 819, 822, 827-830, 835].
[213] Conditions 167, 179, 193 [CB Vol 2, Tab 21, p 827-828, 835].
[214] Conditions 49, 52, 137 [CB Vol 2, Tab 21, p 812-813, 825].
[215] *CEAA, 2012*, ss 19(d),(e), 43(1)(d)(i), 52(1), 53(4); *NEBA*, ss 52(1)(b), 53(7), 54(1)(a); *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at paras 20-21; JRP Report: Vol 1 [CB Vol 1, Tab 20, p 364].
[216] *Morton* at para 95.
[217] *Morton* at paras 83, 88.

addressed, and left these to another decision maker who is not politically accountable.[218] This is improper because it interferes with the legislative assignment of ultimate decision making to the GIC, a democratically accountable body. Instead of adhering to this allocation of responsibility, the GIC relinquished core aspects of its decision making to the NEB at a later time, short-circuiting legislative intent and the rule of law.[219]

D.3 The delegation contravened the precautionary principle

99. The JRP and GIC also acted contrary to the precautionary principle by failing to require further study prior to approval. Instead, these decision makers left NGP and the NEB to assess the consequences of a major accident and whether and how it could be remediated, essential parts of the environmental assessment that attracted significant uncertainty.[220] As in *Greenpeace,* where the court concluded assessment of specific effects of accidents involving radioactive material could not be delegated, here the behaviour of diluted bitumen in the event of serious accidents, and whether it can actually be remediated in the event of a spill, was also delegated impermissibly.[221] The JRP concluded through its conditions that the analysis had to be conducted, but did not perform it itself. Nor did the GIC require the JRP to do so. As the court also concluded in *Greenpeace,* that analysis was a required part of the environmental assessment "so that it could be considered by those with political decision-making power in relation to the Project."[222] That was not done, and renders the decisions invalid.[223]

100. As the approvals were given without a complete assessment of effects or mitigation, and absent standards to guide future assessment, the JRP did not "err on the side of caution" in its decision-making, and instead compromised both protection

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[218] *Greenpeace* at paras 232-239.
[219] Martin ZP Olszynski, "Environmental Assessment as Planning and Disclosure Tool: *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463" (2015) 38:1 Dal LJ (forthcoming).
[220] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40 at para 31; *Castonguay Blasting Ltd v Ontario (Environment)*, [2013] 3 SCR 323, 2013 SCC 52 at para 20; *Morton* at 41-43; *Wier v Canada (Health)*, [2013] FCR 325, 2011 FC 1322 at para 101; Chris Tollefson & Jamie Thornback, "Litigating the Precautionary Principle in Domestic Courts" (2008) 19:1 J Envtl L & P 33.
[221] *Greenpeace* at paras 330-337.
[222] *Greenpeace* at para 334.
[223] Gitxaała adopts the argument of the applicants the Coalition that the JRP's analysis in relation to bitumen spills was unlawful, and the argument of BC Nature that the JRP erred in failing to discharge its obligations under the *CEAA, 2012* to assess the environmental effects of malfunctions or accidents that may occur in connection with the designated project.

of the environment and Gitxaała's rights.[224] The GIC failed to direct the JRP to correct this approach before making its decision on the Project.

D.4 The delegation was improper in the context of consultation

101. The Crown also engaged in delegation of its consultation and accommodation obligations by declining to consult on important issues and deferring these to post-approval processes without delegating the power to consult on behalf of the Crown.[225] The Crown must consult before it makes a decision that may adversely affect established or asserted Aboriginal rights. Failing to do so is an error of law.[226]

102. At the heart of the process of consultation is engagement between the Crown and a First Nation on the effects of a project and how those effects can be mitigated or accommodated. For Gitxaała, how tanker traffic and traditional harvesting are to be reconciled, what harms a spill will cause and how a spill will be cleaned up are central questions. Yet the final resolution of all these issues has been deferred to the post-approval process and delegated to a body that is not the Crown and will not consult. As a result, a core part of the consultation process has been frustrated.

103. Improper delegation of duties is particularly troublesome where the purposes of those duties are to protect the environment and to protect Aboriginal rights and promote reconciliation.[227] Instead of performing their duties transparently, completely, and with precaution, the JRP and GIC have sub-delegated to a future decision-maker without standards or guidance to ensure these statutory and constitutional guarantees could be met.

E. Error #5: The JRP and GIC failed to properly assess the public interest

104. The JRP, in error, did not assess the adequacy of any part of the Crown's consultation and did not assess the seriousness of potential impacts on Title and Governance Rights in its public interest analysis.

105. The JRP was required in making its recommendation to consider "any public interest that in the Board's opinion may be affected by the issuance of the

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[224] *Morton* at para 46.
[225] Conditions 50, 51, 63-66, 95-98, 102-105, 116, 122, 168, 169 and 191 [CB Vol 2, Tab 21, p 812-813, 815, 820, 821-822, 827-828, 834]. Innis Affidavit, Ex 73, pdf page 1376 [GCR Vol 3, Tab 58A, p 1270-18]; Clarke Affidavit, Ex B, Doc # 119C, pdf page 2291-2293, Ex B, Doc # 133, pdf pages 3046-3047, 3231-3233 [GCR Vol 4, Tab 64, p 1378-1380; Tab 66, p 1403-1408]; Clarke Cross, pdf page 55, para 270 [GCR Vol 4, Tab 69, p 1475].
[226] *Tsilhqot'in* at para 78; *Haida Nation* at para 61.
[227] *Morton* at para 94.

certificate[s] or the dismissal of the application."[228] The Supreme Court of Canada, considering nearly identical language found "[t]he constitutional dimension of the duty to consult gives rise to a special public interest," an interest that surpasses a predominantly economic focus.[229] This understanding of the public interest should extend to other constitutional limits, including whether the Project would unjustifiably infringe Gitxaała's Title and Governance Rights.

106. Here, the JRP has the power and the tools to determine questions of law and jurisdiction. Potential impacts on "asserted and proven Aboriginal rights (including Aboriginal title)" are among the issues the JRP was required to consider.[230] The JRP may therefore assess the adequacy of Crown consultation up to the point of the recommendation, and also whether the impacts of the Project could infringe Gitxaała's Title and Governance Rights. It did not do so.

107. Interference with Aboriginal rights requires a "compelling and substantial" purpose,[231] informed by the need to ensure rational connection, minimal impairment and proper consultation so as to protect Aboriginal interests from being trumped by a majority interest.[232] That Aboriginal rights may surpass economic considerations ensures that constitutionally protected legal interests of First Nations are not marginalized or ignored in the name of an insupportably vague notion of public interest or "greater good". To justify a limitation on constitutional rights, the public interest in issue must not be meaninglessly vague or unworkably broad.[233]

108. The JRP's narrow view of the public interest confined its assessment to the economic benefits of the Project (primarily marginally increased oil prices from improved market access) and balanced these against the costs of the Project (narrowly the potential biophysical effects of routine operations or major malfunctions, based on expected values).[234]

109. While discretionary decisions attract some deference, decision makers are limited by their mandates and the Constitution. An error concerning a legal test (the public interest) and the failure to consider a relevant factor (Aboriginal rights and

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[228] *NEBA*, s 52(2)(e).
[229] *Rio Tinto* at para 70.
[230] Hearing Order [MB Vol 1, Tab 9, p 194].
[231] *Sparrow* at para 71.
[232] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746, 2001 SCC 85 at para 52; *Tsilhqotin* at para 80, 87.
[233] *Sparrow* at para 72.
[234] JRP Report: Vol 2 [CB Vol 2, Tab 21, 449-452]; GIC Order [CB Vol 3, Tab 22, p 859, 868-869].

consultation) is a reviewable error of law that does not attract deference. Here, the JRP failed to consider in assessing the public interest both the adequacy of Crown consultation in respect of any Aboriginal rights and the significance of the impact of the Project on Title and Governance Rights, thus excluding a consideration of whether or not the Project would infringe these rights and be rendered unconstitutional.

110. This error is egregious as it undermines reconciliation – a crucial public interest that underlies both the duty to consult and the protection against infringement under s. 35 of the *Constitution Act, 1982*.[235] Section 35 represents a long political and legal struggle for the constitutional recognition of Aboriginal rights as legal rights.[236] A purpose for providing constitutional protection for Aboriginal rights was to ensure protection for Aboriginal groups as minorities, and therefore "reflects an important underlying constitutional value".[237] Failing to consider the public interest in advancing reconciliation and protecting minority interests, and instead opining generally that "Canada is better off," threatens to undermine the very purpose of s. 35 and the constitutional protection of Aboriginal rights and title. Instead of advancing reconciliation, the JRP and in turn the GIC compromised and put off that process, risking irreparable harm to Aboriginal peoples, their lands and their cultures.[238] "This is not reconciliation. Nor is it honourable."[239]

111. Given these errors, the GIC could not rely on the JRP Report as a proper evaluation of the public interest, for which the GIC is independently responsible in making its decision.[240] It too should be quashed on the same basis as above.[241]

F. An effective remedy is required

112. Each error described above is a legal error that vitiates the approval process on statutory or constitutional grounds. Each error resulted in Gitxaała's Title and

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[235] It is also a failure to meet the requirements of the *CEAA, 2012*, the *NEBA*, the Amended JRP Agreement and the Amended Hearing Order: List of Issues.
[236] *Sparrow* at paras 50-53.
[237] *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998] SCJ No 61 at para 82.
[238] *The Council of the Haida Nation et al v Minister of Fisheries and Oceans*, 2015 FC 290, [2015] FCJ No 281 [*Haida #*2] at paras 53-54.
[239] *Haida* at para 33.
[240] *NEBA*, ss 52(1)(a), 54.
[241] Gitxaała adopts the submissions of Haisla regarding the Crown's failure to consider impacts to Aboriginal rights in its public interest assessment.

Governance Rights being ignored or shunted to a post-approval process that could not affect the decision at hand, despite requirements to do the opposite.

113. The rule of law demands effective remedies.[242] The Court has the discretion to fashion an appropriate remedy on judicial review, exercised with regard to the balance of convenience.[243] Here the balance of convenience weighs heavily in favour of quashing the Order and Certificates. The rights that have been breached are constitutional rights and part of the supreme law of Canada. Actions contrary to s. 35 rights and the duty to consult are presumptively of no force and effect.

114. Breaches of constitutional rights, including Aboriginal rights and the duty to consult, constitute irreparable harm because of the effect such breaches have in undermining the process of reconciliation.[244] Here there are no further opportunities to consult with respect to whether or not the Project will proceed – that decision has been made and cannot be revisited. If the Project is built there will be no meaningful opportunity to actually change the decision and avoid the vessel traffic given the enormous investment involved and the physical infrastructure that will be constructed.[245] As such the balance of convenience weighs heavily in favour of setting aside the JRP Report, Order and Certificates so as to allow the Crown to properly discharge its constitutional and statutory duties should NGP elect to proceed with its application. Given the invalidity of the JRP Report and the GIC Order, Gitxaała submits that the Appeal of the Certificates should be allowed, as the certificates are without necessary statutory preconditions. A decision, order or certificate that lacks statutory preconditions is invalid at law, and must be set aside. Given that both the JRP Report and the Order should be found to be invalid given all of the foregoing arguments, the Certificates should be set aside.[246]

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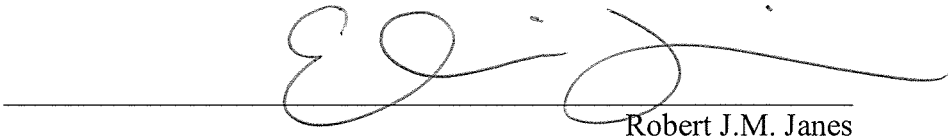
[242] *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6, 2010 SCC 2 at para 52.
[243] *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 36.
[244] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, [1994] SCJ No 17 (QL) at para 59; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2014) (looseleaf updated April 2013), ch 15 at 19-20, 23; *Haida Nation v Canada (Fisheries and Oceans)* at paras 53-54.
[245] *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 579 at para 49. This was the case in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992] SCJ No 1 (QL) at para 108.
[246] Gitxaała adopts the submissions of Unifor relating to the effects of finding the JRP Report and/or the Order to be invalid. Gitxaała adopts the submission of Kitasoo and Heiltsuk respecting the inadmissibility of the affidavits served by NGP.

Part IV – Orders Sought

115. Gitxaała seeks the orders set out in its Notices of Application and Appeal.[247] These include: (1) a declaration that the GIC breached the duty to consult with Gitxaała; (2) a declaration that the Order and Certificates unjustifiably infringe Gitxaała's Title and Governance Rights; (3) that the JRP Report, the Order and the Certificates be set aside; and (4) costs. An order only need be made in respect of the constitutionality of s. 54 of the *NEBA* if the Court were to hold that the proper construction of the statute was that the Certificates had to issue and stand even if the Order is unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 22nd day of May, 2015



Robert J.M. Janes
Elin R.S. Sigurdson
Virginia C. Mathers
Christopher J. Evans
Counsel for the Applicant/Appellant
Gitxaała Nation

[247] Notice of Application (JRP) [CB Vol 1, Tab 3, p 37-38]; Notice of Application (GIC) [CB Vol 1, Tab 7, p 98-100]; Notice of Appeal (Certificates) [CB Vol 1, Tab 17, 329-331].

PART V – LIST OF AUTHORITIES

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11. *Castonguay Blasting Ltd v Ontario (Environment)*, [2013] 3 SCR 323, 2013 SCC 52
12. *Chief Councillor Matthew Hill (Kitkatla) v. Minister of Small Business, Tourism and Culture (BC) et al*, 61 BCLR (3d) 71, 1998 CanLII 1712 (BCSC)
13. *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244, [2014] FCJ No 1308

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