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FEDERAL COURT OF APPEAL

BETWEEN:

GITXAALA 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 Kitsoo
Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all
members of the Heiltsuk 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

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MEMORANDUM OF FACT AND LAW
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OPENING STATEMENT

Unfortunately we are not able to be all at Home here in Hartley Bay in time to meet you as our work is not yet done at the Canneries, so, we decided to leave this note for you in case you visit our Village during our absence....

We shall not consider or accept any offer from any one until our claim is settled by Justice. Our prayer is that our Title for our lands and unsurrendered lands be made clearer, recognized and acknowledged to us by both the Dominion and Provincial Governments. That is the vital point of our request or claim.

We have no new request or new thing to state before you, but the same old claim demanding our Title be settled by Justice.

- Letter from Gitga'at Chiefs to E. L. Wetmore, Chairman, the Royal Commission for the Province of British Columbia, August 1913.¹

1. In *Haida Nation*, the Supreme Court of Canada stated, "Section 35 represents a promise of rights recognition."² The Court immediately added, "[i]t is always assumed that the Crown intends to fulfil its promises."³
2. The Gitga'at First Nation (*Gitga'at*) comes to this Court asking it to hold the federal Crown to its constitutional promise.
3. To this end, Gitga'at questions whether the constitutional promise to recognize Gitga'at's Aboriginal rights, including particularly its Aboriginal title, properly informed Canada's conduct in the decision-making process that culminated in the Governor in Council (*GIC*) approving the Northern Gateway Project (*Project*) and consequently ordering the National Energy Board to issue the requested certificates of public convenience and necessity (*GIC's Order* or *Order*).⁴
4. Specifically, Gitga'at questions whether it was consistent with its constitutional promise for Canada to:
 - a. treat the recognition of Gitga'at title as a matter of Crown discretion until it has been established in court, regardless of whether the available evidence satisfied the requirements for its recognition;

¹ Affidavit #1 of Richard Inglis sworn February 4, 2015 [*Inglis Affidavit*], Exhibit E, pdf p 134 [GCR, Vol 2, Tab 24, page 37].

² *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at 20 [*Haida Nation*].

³ *Ibid.*

⁴ [Statement of Agreed Facts ["AF"], MB, Vol 1, Tab 1, page 14, paras 60-1].

- b. leave recognition of Gitga'at title no more advanced at the end of its decision making process than it was at the beginning, despite Canada's encouragement to Gitga'at – and Gitga'at's reciprocal efforts - to provide evidence of its title and rights in and through the Northern Gateway Joint Review Panel process;
- c. treat the nature and scope of the rights as articulated by Gitga'at and the significance Gitga'at placed on them and their potential infringement as irrelevant to the determination of its duty to consult and accommodate Gitga'at; and
- d. refuse to respond to, including refuse to discuss its assessment of, the evidence in support of Gitga'at's title and rights claims.

5. Although Gitga'at is challenging the GIC's Order as an unjustified infringement of its title and, in the alternative, as resting on inadequate consultation and accommodation, it is Gitga'at's position that Canada's neglect of its constitutional promise to recognize its title and rights is at the heart of its shortcomings in regard to justification for its infringement of Gitga'at title and its duty to consult and accommodate Gitga'at, and also sufficient warrant for the relief Gitga'at is seeking.

PART I – CONCISE STATEMENT OF FACT

6. Gitga'at relies on the Statement of Agreed Facts and other facts referenced in this Memorandum.

7. Gitga'at is a southern Tsimshian people that traces its presence in its traditional territory back thousands of years to its founding lineages, the Wolf, Raven, Eagle and Killerwhale clans.⁵ Gitga'at's traditional territory is represented by the map attached to a 2009 letter from Gitga'at to the Canadian Environmental Assessment Agency (CEAA), (*Traditional Territory*).⁶

8. From the outset of Canada's consultations with Gitga'at on the Northern Gateway Pipelines (NGP) Project (*Project*) to their culmination with the GIC's Order, Gitga'at stood on its Aboriginal title and drew attention to the fact that the Project's tankers would have to pass through territory subject to Gitga'at title and rights.⁷

⁵ Exhibit D71-11-1, pdf pp 14-18 [GCR Vol 1, Tab 1, page 14-18].

⁶ Exhibit D71-9-3, pdf p 9 [GCR Vol 1, Tab 2, page 69] the map is identical to the map appended as Exhibit A to the Gitga'at-BC Strategic Land Use Planning Agreement (2006), Exhibit D71-8-7, pdf p 15 [GCR Vol 1, Tab 3, page 119].

⁷ Affidavit of Arnold Clifton, sworn February 2, 2015 [*Arnold Clifton Affidavit*], paras 31, 33, 50, 57-9, 72, 74-78, 80-2, 88-9, 104-5, Exhibit B, G, R [GCR, Vol 2, Tab 25, pages 106-7, 110-3, 115-9, 120, 124-5, 132-3, 173-8, 235-7], Exhibit D71-9-3 [GCR, Vol 1, Tab 2]; Exhibit D71-9-8 [GCR, Vol 1, Tab 4]; Exhibit D71-35-2 [GCR, Vol 1, Tab 5].

9. Gitga’at submitted extensive written and oral evidence to the Panel. Its written evidence consisted of 8 expert reports and 16 documents supporting “the Gitga’at First Nation’s title, rights and interests”⁸ Gitga’at’s oral evidence was given over two days by 22 Gitga’at individuals, including Gitga’at youth, elders, matriarchs, elected members of Council and Hereditary Chiefs.⁹

10. In its Final Argument to the JRP, Gitga’at articulated the nature and scope of the Aboriginal rights claims for the JRP, including the full geographic extent and significance of the title it was claiming in connection with the Project; summarized its evidence for the existence of its claimed title and rights; and described the nature and significance of the Project’s potential infringement of its title.¹⁰

PART II – POINTS IN ISSUE

11. This application addresses the following points in issue:

- A. Whether the GIC’s Order unjustifiably infringed Gitga’at’s Aboriginal title;
- B. In the alternative, whether Canada breached its duty to consult and accommodate Gitga’at; and
- C. Whether the JRP acted inconsistently with section 35 of the *Constitution Act, 1982*.

PART III – SUBMISSION

A. Whether the GIC’s Order Unjustifiably Infringed Gitga’at Title

12. In its Application for judicial review in respect of the GIC’s Order, Gitga’at asked this Court for an order setting aside the GIC’s Order.¹¹ Gitga’at stated the primary ground for its application as follows:

The Governor in Council erred in law or jurisdiction by making the Order without the Federal government having either obtained Gitga’at consent or ensured constitutional justification for its infringement of Gitga’at title.¹²

⁸ Exhibit D71-7-1 pdf pp 1-3 [GCR, Vol 1, Tab 7, pages 243-5], for the expert reports, see D71-7-2 - D71-9-8 (not all in the GCR), Exhibit D71-11-1 [GCR, Vol 1, Tab 1].

⁹ Arnold Clifton Affidavit para 84 [GCR, Vol 2, Tab 24, page 119]; Hearing transcript, Vol 24 [GCR Vol 3, Tab 33], Hearing transcript, Vol 25 [GCR Vol 3, Tab 34].

¹⁰ Exhibit D71-35-2 at paras 257-289, 299 [GCR, Vol 1, Tab 5, pages 201-8, 211].

¹¹ [Basic Common Book [“CB”], Vol 1, Tab 10, page 179, para 1(g)].

¹² [CB, Vol 1, Tab 10, page 199, para 60].

In reference to this specific ground, Gitga'at also asked for declarations of Gitga'at title and unjustified infringement of its title.¹³

13. The question of whether Canada unjustifiably infringed Gitga'at title does not arise unless it has first been determined that Gitga'at has title and that its title has been infringed. While the burden of proving justification is Canada's,¹⁴ the burden of proving title and infringement is Gitga'at's.¹⁵

Requirements for Recognition of Title

14. Section 35 contains a promise to recognize the existing aboriginal rights of aboriginal peoples.¹⁶ Recognition of their existing aboriginal titles is included.¹⁷

15. Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures: it confers the right to the land itself.¹⁸ Specifically, "Aboriginal title confers ownership rights ... including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land."¹⁹

16. "[T]he general requirements for aboriginal title" are: (1) 'sufficient occupation' of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation.²⁰

17. "The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title."²¹

¹³ [CB, Vol 1, Tab 10, pages 178-9, paras 1(a)-(c)].

¹⁴ *R. v. Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 at 1109, 1110, & 1119 [Sparrow]; *R. v. Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 at 135 [Van der Peet]; and *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44 at 77 & 125 [Tsilhqot'in].

¹⁵ *Sparrow*, *supra* note 20 at 1112; *Van der Peet*, *supra* note 20 at 135; and *Tsilhqot'in*, *supra* note 20 at 50.

¹⁶ *Haida Nation*, *supra* note 2 at 20.

¹⁷ *R. v. Adams*, [1996] 3 SCR 101, 1996 CanLII 169 at 25; *Van der Peet*, *supra* note 20 at 74; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at 2 [Delgamuukw]; & *R. v. Marshall*; *R. v. Bernard*, [2005] 2 SCR 220, 2005 SCC 43 at 39.

¹⁸ *Delgamuukw*, *supra* note 23 at 138.

¹⁹ *Tsilhqot'in*, *supra* note 20 at 73 & 88.

²⁰ *Ibid* at 50.

²¹ *Ibid* at 14.

18. “The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective”:²²

The Aboriginal perspective focuses on laws, practices, customs and traditions of the group.... In considering this perspective for the purpose of Aboriginal title, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”....

The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.²³

19. As part of the Aboriginal perspective on occupation, “[r]elevant laws might include ... a land tenure system or laws governing land use.”²⁴

20. To meet the test for sufficient occupation,

... the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. ... There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.²⁵

21. “Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises – continuity between present and pre-sovereignty occupation.”²⁶ In the case of Aboriginal title, “[c]ontinuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times.”²⁷

22. The exclusivity requirement is described as follows:

²² *Ibid* at 34.

²³ *Ibid* at 35-6 (citations omitted).

²⁴ *Delgamuukw*, *supra* note 23 at 148.

²⁵ *Tsilhqot'in*, *supra* note 20 at 38, 54: “Regular use of territory suffices to establish sufficiency...”.

²⁶ *Ibid* at 45.

²⁷ *Ibid* at 46.

The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had “the intention and capacity to retain exclusive control” over the lands. ...

... Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question.

As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. ...²⁸

Sufficiency of Pre-Sovereignty Occupation

23. The portion of its Traditional Territory over which Gitga’at claims title in these proceedings is described in paragraph 1 of its Notice of Application (A-445-14) and represented on the map appended thereto (*Title Claim Area* or *TCA*).²⁹ The Title Claim Area falls within the area designated as the three main regions “fundamental to the Gitk’a’ata economy and way of life”³⁰ in the expert report of Susan Marsden (*Three Main Regions* or *TMRs*).³¹ (Herein the Applicant will sometimes refer to them individually as the *Southern TMR*, the *Middle TMR*, and the *Northern TMR*.) The TMRs and thus the TCA fall within the larger Gitga’at Traditional Territory.

Manner of Life, Material Resources & Character of Lands Claimed

24. Gitga’at is a “maritime nation”;³² since time immemorial, Gitga’at people have “basically lived out of the sea”.³³ The marine focus of Gitga’at’s culture, economy and worldview is of key importance to properly assessing the ‘sufficiency’ of its occupation of its Traditional Territory generally and the TCA specifically as this speaks to Gitga’at’s manner of life, material resources, and technological abilities, as well as the character of the lands claimed in this proceeding, submerged or otherwise.

²⁸ *Ibid* at 47-49.

²⁹ [CB, Vol 1, Tab 10, page 179, para 1(a), page 204].

³⁰ Although now subsumed by the occupancy requirement, it is still sound law to say that “... a claim to title is made out when a group can demonstrate ‘that their connection with the piece of land ... was of a central significance to their distinctive culture’” (*Delgamuukw*, *supra* note 23 at 142, 150-1).

³¹ Exhibit D71-11-1 pdf pages 23, 53 [GCR, Vol 1, Tab 1, pages 23, 53].

³² Hearing transcript, Vol 24, pdf p 17, para 14683, Chief Robert Hill [GCR Vol 3, Tab 33, page 17].

³³ Exhibit D71-11-1, pdf p 47 [GCR, Vol 1, Tab 1, page 47].

25. Gitga'at's Traditional Territory is extraordinarily rich in marine life and while Gitga'at's economy has changed over time, it has always been first and foremost a marine economy, with the consumption and inter-tribal trade of seafood being of central importance to Gitga'at's way of life.³⁴ Gitga'at has continuously maintained an extensive number of seafood harvesting locations throughout its Traditional Territory and employed very sophisticated techniques to harvest, cook and preserve seafood.³⁵ Gitga'at's longstanding reliance on marine resources and routes throughout its history is supported by the existence of canoe skids or runs, shell middens, clam beds and numerous fish traps throughout its Traditional Territory.³⁶

Present Occupation Rooted in Pre-Sovereignty Times

26. In addition to archaeological features in the intertidal zone, Gitga'at's regular use and occupation of the TCA since before contact is also attested by numerous culturally modified trees, gravesites, pictographs, petroglyphs and rock shelters throughout the area.³⁷ A recent archaeological study submitted to the JRP found 19 previously unrecorded archaeological sites in the intertidal areas of the TCA in a short three day period, as well as evidence that numerous additional undiscovered sites exist.³⁸

27. In the early contact period, Gitga'at's Traditional Territory was infrequently visited by early maritime fur traders and explorers, but Gitga'at's first interactions with Europeans are recorded from the expeditions of James Colnett in 1787, Jacinto Caamano in 1792 and George Vancouver in 1792-1793.³⁹ In the mid-19th century, the establishment of the Hudson's Bay Company at Fort Simpson led to significant cultural shifts for Coast Tsimshian peoples but Gitga'at continued to practice a traditional lifestyle augmented with material elements from the Europeans.⁴⁰ In 1857, after British sovereignty had been asserted over Gitga'at's Traditional Territory, the arrival of William Duncan of the Church Missionary Society led to even greater cultural disruptions in the lives of Coast Tsimshian peoples, particularly with his establishment of

³⁴ Exhibit D71-11-1, pdf pp 8, 54 [GCR, Vol 1, Tab 1, pages 8, 54]; Hearing transcript, Vol 24, pdf p 24, paras 14737-9, Kyle Clifton [GCR Vol 3, Tab 33, page 24].

³⁵ Exhibit D71-11-1, pdf p 8 [GCR, Vol 1, Tab 1, page 8].

³⁶ Exhibit D71-7-8, pdf pp 3, 12, 15, 21-2, 28, 30, 37-8 [GCR, Vol 1, Tab 9, pages 384, 388, 391, 397-8, 404, 406, 413-4]; Exhibit D71-11-1, pdf pp 8, 27, 32, 37, 40, 44, 48 [GCR, Vol 1, Tab 1, pages 8, 27, 32, 37, 40, 44, 48].

³⁷ Exhibit D71-7-8, pdf pp 3, 21-24, 28-30, 38 [GCR, Vol 1, Tab 9, pages 384, 397-400, 404-6, 414].

³⁸ Exhibit D71-7-8, pdf pp 3, 18, 20, 21, 23, 24, 28-9, 33, 37-8 [GCR, Vol 1, Tab 9, pages 384, 394, 396-7, 399-400, 404-5, 409, 413-4].

³⁹ Inglis Affidavit, Exhibits B, C, G, H, pdf pp 37-41, 106-107, 144-196 [GCR, Vol 2, Tab 25, pages 4-8, 10-11, 48-100].

⁴⁰ Inglis Affidavit, Exhibit C, pdf p 107 [GCR, Vol 2, Tab 25, page 11].

the model Christian village of Metlakatla in 1862 where Tsimshian residents were urged to eschew their ancestral customs.⁴¹ Yet even during this time of significant cultural upheaval, Gitga'at residents of Metlakatla still travelled to their traditional fishing and food gathering camps up to eighty miles away.⁴² By 1887, some thirty Gitga'at people returned to Gitga'at's Traditional Territory to establish the modern village of Hartley Bay at a fall harvesting camp.⁴³ The majority of Gitga'at people followed between 1888 and 1889.⁴⁴ In spite of the profound influence of the missionaries in these years, Gitga'at maintained its traditional food-gathering customs and continued to travel between its various harvesting camps according to the season.⁴⁵

28. To this day, Gitga'at continues to harvest, trade and rely upon a wide variety of species within the TCA.⁴⁶ Vital marine foods include seaweed (a food staple that plays a central role in Gitga'at trade),⁴⁷ anadromous fish such as salmon and eulachon,⁴⁸ deep sea fish such as halibut and cod,⁴⁹ molluscs such as chitons, abalone, clams and cockles,⁵⁰ echinoderms such as sea cucumber and urchin,⁵¹ crustaceans such as crab and prawns,⁵² and herring eggs collected on kelp and eelgrass.⁵³ Gitga'at also hunts and traps a wide range of both land and sea mammals as well, with much of this activity focused in or near the ocean and along beaches.⁵⁴ Several of Gitga'at's traditional marine foods have been identified as "cultural keystone species" - species that are "so culturally salient that [they] shape the identity of a people".⁵⁵ These keystone species

⁴¹ Inglis Affidavit, Exhibit C, pdf pp 108-110 [GCR, Vol 2, Tab 25, pages 12-4].

⁴² Inglis Affidavit, Exhibit C, pdf p 110 [GCR, Vol 2, Tab 25, page 14].

⁴³ *Ibid* pdf pp 110-111 [GCR, Vol 2, Tab 25, pages 14-5].

⁴⁴ *Ibid* pdf pp 112, 115 [GCR, Vol 2, Tab 25, pages 16, 19].

⁴⁵ *Ibid* pdf p 116 [GCR, Vol 2, Tab 25, page 20].

⁴⁶ See, eg, Hearing transcript, Vol 24, pdf pp 62-5, paras 15060-80, Helen Clifton [GCR Vol 3, Tab 33, pages 62-5]; see also, Exhibit D71-8-5 [GCR, Vol 1, Tab 10].

⁴⁷ Exhibit D71-11-1, pdf pp 8, 23-27, 33, 48, 54 [GCR, Vol 1, Tab 1, pages 8, 23-27, 33, 48, 54].

⁴⁸ *Ibid* pdf pp 17, 23, 26-28, 32, 36, 37, 39, 45-50, 54 [GCR, Vol 1, Tab 1, pages 17, 23, 26-28, 32, 36, 37, 39, 45-50, 54]; Exhibit D71-7-7, pdf pp 43, 64, 67, 78 [GCR, Vol 1, Tab 11, pages 458, 479, 482, 493].

⁴⁹ Exhibit D71-11-1, pdf pp 8, 23, 24, 26, 27, 31, 36, 39, 48, 54 [GCR, Vol 1, Tab 1, pages 8, 23, 24, 26, 27, 31, 36, 39, 48, 54].

⁵⁰ *Ibid* pdf pp 23-27, 33, 36, 38, 40, 41, 47, 51 [GCR, Vol 1, Tab 1, pages 23-27, 33, 36, 38, 40, 41, 47, 51].

⁵¹ *Ibid* pdf pp 23, 26-8, 38, 41 [GCR, Vol 1, Tab 1, pages 23, 26-8, 38, 41].

⁵² Exhibit D71-7-7, pdf pp 24, 35, 43, 64, 78, 104 [GCR, Vol 1, Tab 11, pages 439, 450, 458, 479, 493, 519].

⁵³ *Ibid* pdf pp 43, 56, 64, 69, 70, 78, 80, 104 [GCR, Vol 1, Tab 11, pages 458, 471, 479, 484-5, 493, 495, 519].

⁵⁴ Exhibit D71-11-1, pdf pp 36, 54 [GCR, Vol 1, Tab 1, pages 36, 54].

⁵⁵ Exhibit D71-7-7, pdf p 104 [GCR, Vol 1, Tab 11, page 519].

play a particularly critical role in Gitga'at's way of life for the purposes of food, harvest, distribution, knowledge transmission and feasting.⁵⁶

29. Gitga'at has “an unbroken and extensive economic relationship” to its territories that has evolved over time with a movement toward greater integration and centralization between lineages.⁵⁷ While each lineage may have once inhabited and used its territory year round, in the modern period Gitga'at came to live year round in the central villages of Laxgalts'ap (Old Town) and K'algiuu (Hartley Bay), travelling seasonally to house territories for harvesting activities.⁵⁸ Nevertheless, the three TMRs remain paramount to Gitga'at's economy, culture and identity, representing “places associated with relationships among extended family and among human entities in the natural world” and sites for the “inter-generational transmission of knowledge” with respect to other species and places, survival and food production, and sociality.⁵⁹

30. The Southern TMR represents the location of Gitga'at's annual spring harvest of early salmon, seaweed, birds' eggs, halibut and other seafood.⁶⁰ Since time immemorial, Gitga'at has used K'yel as a base camp for harvesting, processing and storage of the abundant resources within this TMR every spring.⁶¹ There is historic evidence that Gitga'at once lived and harvested at K'yel year round in the form of a large midden indicating winter seafood use and numerous fish traps indicating summer harvesting of salmon.⁶² Now, Gitga'at often refers to K'yel as “the seaweed camp” because this site and its vicinity are particularly important as a seasonal camp for the spring harvest, drying and storage of seaweed.⁶³ In the past, Gitga'at paddled here in dugout cedar canoes, and used cedarwood trays or bedrock headlands to dry the

⁵⁶ *Ibid* pdf pp 8, 24 [GCR, Vol 1, Tab 11, pages 423, 439].

⁵⁷ Exhibit D71-11-1, pdf p 8 [GCR, Vol 1, Tab 1, page 8].

⁵⁸ *Ibid*.

⁵⁹ Exhibit D71-7-7, pdf p 76 [GCR, Vol 1, Tab 11, page 491].

⁶⁰ Exhibit D71-11-1, pdf p 23 [GCR, Vol 1, Tab 1, page 23].

⁶¹ *Ibid* pdf pp 23, 25-27 [GCR, Vol 1, Tab 1, pages 23, 25-27]; Exhibit D71-7-7, pdf pp 5, 38, 44-46, 58, 60-1, 65, 71-76, 79, 83, 85, 95-6, 105, 110-13, 115-120, 122-3 [GCR, Vol 1, Tab 11, pages 420, 453, 459-61, 473, 475-6, 480, 486-491, 494, 498, 500, 510-11, 520, 525-7, 530-5, 537-8]; Hearing transcript, Vol 24, pdf pp21-2, paras 14712, 14722, Kyle Clifton, pdf p 26, paras 14753-4, Chief Albert Clifton pdf p 53, paras 14983-4, Hilary Robinson [GCR Vol 3, Tab 33, pages 21-2, 26, 53]; Hearing transcript volume 25, pdf pp39-41, paras 15550-67, Bruce Reece [GCR Vol 3, Tab 34, pages 127-9].

⁶² Exhibit D71-11-1, pdf p 23 [GCR, Vol 1, Tab 1, page 23].

⁶³ *Ibid* pdf pp 25-27, 33 [GCR, Vol 1, Tab 1, pages 25-27, 33]; Exhibit D71-7-7, pdf pp 5, 44-46, 65, 71-74, 79, 81-2 [GCR, Vol 1, Tab 11, pages 420, 459-461, 480, 486-9, 494, 496-7]; Hearing transcript Vol 24, pdf p 49, paras 14953, Morgan Hill, pdf p. 55, para 15002, Helen Clifton [GCR Vol 3, Tab 33, pages 49, 55].

seaweed and cedar bentwood boxes to process and store the seaweed; today, speedboats, punts, nylon sacks and plastic totes fulfill these same purposes.⁶⁴ K'yel has also remained a key seasonal base camp for Gitga'at's harvesting of halibut and, when it was still available, abalone, among other seafood.⁶⁵

31. The Middle TMR is a region that includes the main areas used by Gitga'at for the fall to winter activities of hunting and trapping land and sea mammals, as well as Fin Island, which is exceptionally rich in winter seafood.⁶⁶ Habitation sites and fish traps within this TMR indicate probable year round occupation in earlier times, and the modern year round Gitga'at village of K'algiuu (Hartley Bay) is located here.⁶⁷ K'algiuu is an area where Gitga'at has "feasted and harvested for many generations and where access to their resource base has been relatively undisrupted".⁶⁸ Several smokehouses continue to be operated in K'algiuu, people continue to freeze, dry and jar foods for the winter in this community, and its vicinity remains key for the harvesting of species such as cod, salmon and harbour seal.⁶⁹ Fin Island remains a key site for the harvesting of shellfish, rockfish and sea cucumber, especially the winter shellfish harvesting site known as Lax Kwil Dziidz or "Clamstown".⁷⁰

32. The Northern TMR is the centre of summer to fall activity for the modern Gitga'at economy.⁷¹ It is in this area that Gitga'at harvests and preserves salmon for winter and gathers cockles, clams, crabs and a wide variety of berries and plants.⁷² The main

⁶⁴ Exhibit D71-7-7, pdf p 73 [GCR, Vol 1, Tab 11, page 488].

⁶⁵ Exhibit D71-11-1, pdf pp 23-7 [GCR, Vol 1, Tab 1, pages 23-7]; *ibid* pdf pp 36, 72-3, 83, 104, 110, 113 [GCR, Vol 1, Tab 11, pages 451, 487-8, 498, 519, 525, 528]; Hearing transcript Vol 25, pdf p 13, para 15324, Margaret Reece [GCR Vol 3, Tab 34, page 101]; Inglis Affidavit, Exhibit C, pdf p 116 [GCR, Vol 2, Tab 25, page 20].

⁶⁶ Exhibit D71-11-1, pdf p 36 [GCR, Vol 1, Tab 1, page 36]; Hearing transcript Vol 24, pdf p 21, para 14712, Kyle Clifton [GCR Vol 3, Tab 33, page 21].

⁶⁷ Exhibit D71-11-1, pdf p 36 [GCR, Vol 1, Tab 1, page 36].

⁶⁸ Exhibit D71-7-7, pdf p 5 [GCR, Vol 1, Tab 11, page 420].

⁶⁹ *Ibid* pdf pp 38, 40, 113-5, 118 [GCR, Vol 1, Tab 11, pages 453, 455, 528-30, 533].

⁷⁰ Exhibit D71-11-1, pdf pp 38, 52 [GCR, Vol 1, Tab 1, pages 38, 52]; *ibid* pdf pp 44, 65, 74, 79, 111 [GCR, Vol 1, Tab 11, pages 459, 480, 489, 494, 526]; Hearing transcript volume 25, pdf p 46, para 15606, Bruce Reece [GCR Vol 3, Tab 34, page 134].

⁷¹ Exhibit D71-11-1, pdf p 45 [GCR, Vol 1, Tab 1, page 45]; Exhibit D71-7-7, pdf p 58 [GCR, Vol 1, Tab 11, page 473].

⁷² Exhibit D71-11-1, pdf p 45 [GCR, Vol 1, Tab 1, page 45]; Hearing transcript Vol 24, pdf p 21, para 14711, Kyle Clifton, pdf p 26, para 14755, Chief Albert Clifton, pdf p 33, para 14807, Chief Arnold Clifton, pdf p 54, paras 14992-4, Hilary Robinson [GCR Vol 3, Tab 33, pages 21, 26, 33, 54]; Hearing transcript Vol 25, pdf pp 44, paras 15585-6, Bruce Reece [GCR Vol 3, Tab 34, page 132]; Inglis Affidavit, Exhibit C, pdf p 116 [GCR, Vol 2, Tab 25, page 20].

habitation site in this area, Laxgalts'ap (Old Town), is known to have been a central year round village of considerable longevity and it was the last central village inhabited by Gitga'at before they were dispersed by missionary activity.⁷³ Laxgalts'ap is also the only central village to have been inhabited by all the lineages of all the clans of Gitga'at prior to European contact.⁷⁴ As a testament to its key significance, it is said that Gitga'at takes its very name from this site.⁷⁵ A number of petroglyphs located at Laxgalts'ap also attest to Gitga'at's long history in this TMR, with each rock said to represent an individual family's story, as does the historic man-made island at the site said to have been constructed for strategic defence.⁷⁶ The area surrounding Laxgalts'ap remains a key site for Gitga'at's harvest of medicinal plants as well as species of crab, salmon and duck, among others.⁷⁷ K'disgos (Kishkosh) is another key harvesting area in this TMR, particularly valued for the harvesting of shellfish, crab, salmon and harbour seal.⁷⁸

33. The areas surrounding K'yel in the Southern TMR, K'algiuu and Fin Island in the Middle TMR and Laxgalts'ap in the Northern TMR also represent four of the most important cultural landscapes in Gitga'at's Traditional Territory due to the high density of place names associated with oral traditions and historical events in these locations.⁷⁹ Gitga'at's place names are descriptive of its lands and waters and the activities that take place in its Traditional Territory.⁸⁰ Gitga'at's retention and transmission of this knowledge over time depends on regularly visiting and using these locations and in this way also speaks to Gitga'at's continuous occupation and use of these areas.

34. In addition to the gathering of resources for food, medicine and inter-tribal trade, Gitga'at's continuous use and occupation of its Traditional Territory and the TCA has

⁷³ Exhibit D71-11-1, pdf p 45 [GCR, Vol 1, Tab 1, page 45].

⁷⁴ *Ibid.*

⁷⁵ *Ibid* pdf p 16 [GCR, Vol 1, Tab 1, page 16]; Exhibit D71-7-7, pdf p 16 [GCR, Vol 1, Tab 11, page 431]; Hearing transcript Vol 24, pdf p 21, para 14710, Kyle Clifton [GCR Vol 3, Tab 33, page 21]; Inglis Affidavit, Exhibit C, pdf p 105 [GCR, Vol 2, Tab 25, page 9].

⁷⁶ Exhibit D71-7-7, pdf pp 8, 12, 92-3, 98 [GCR, Vol 1, Tab 11, pages 423, 427, 507-8, 513]; Hearing transcript Vol 24, pdf p 51, paras 14970-1, Morgan Hill [GCR Vol 3, Tab 33, page 51]; Transcript Vol 25, pdf p 54, para 15587, Bruce Reece [GCR Vol 3, Tab 34, page 142].

⁷⁷ Exhibit D71-11-1, pdf pp 47-8 [GCR, Vol 1, Tab 1, pages 47-8]; Exhibit D71-7-7, pdf pp 105, 114, 116-7 [GCR, Vol 1, Tab 11, pages 520, 529, 531-2].

⁷⁸ Exhibit D71-11-1, pdf pp 50-1 [GCR, Vol 1, Tab 1, pages 50-1]; Exhibit D71-7-7, pdf pp 5, 44, 65, 74, 76, 79, 105, 111, 118 [GCR, Vol 1, Tab 11, pages 420, 459, 480, 489, 491, 494, 520, 526, 533].

⁷⁹ Exhibit D71-7-7, pdf pp 7, 98 [GCR, Vol 1, Tab 11, pages 422, 513].

⁸⁰ Exhibit D71-11-1, pdf p 11 [GCR, Vol 1, Tab 1, page 11]; Hearing transcript Vol 24, pdf p 57, para 15018, Helen Clifton [GCR Vol 3, Tab 33, page 57].

been maintained through participation in commercial fishing and trapping activities as well.⁸¹ Among other things, this included employment at a cannery operated by Gitga'at members on Gitga'at lands at Clamstown.⁸²

Laws, Practices, Customs & Traditions

35. Gitga'at is a Tsimshian people and it shares the underpinnings of many of its political, legal and social institutions with the Nisga'a and Gitksan nations.⁸³ Since before the assertion of British sovereignty, Gitga'at's socio-political institutions have included the house, tribe, region and nation, and cross-cutting these, the lineage (a network of houses of common ancestry) and the clan.⁸⁴ The house is a matrilineal kin group that represents the "fundamental political and land owning unit in Tsimshian society" and houses are economically and politically integrated within a common geography to make up the Tsimshian tribe of Gitga'at.⁸⁵ Lineages trace the common history and ancient heritage of certain houses and they make up clans, which represent larger exogamous matrilineal groups among northwest coast nations.⁸⁶

36. Tsimshian society is founded upon "the inalienable and exclusive title of each house to its territories and resources".⁸⁷ Tsimshian society also has its own unique system of laws, *ayaawx*, concerning responsibilities, rights and title.⁸⁸ The complex Tsimshian legal system determines how house territories are acquired and inherited and regulates rights of access and resource use within these territories.⁸⁹ Membership in a house is inherited matrilineally and is formalized in a feast and the taking of a name that carries with it rights to use specific areas in house territories.⁹⁰ The hereditary chief

⁸¹ Hearing transcript Vol 24, pdf pp 27-8, paras 14759-69, Chief Albert Clifton, pdf p 31, paras 14787-9, Chief Ernie Hill [GCR Vol 3, Tab 33, pages 27-8, 31]; Transcript Vol 25, pdf p 25, paras 15431-6, Alan Robinson, pdf p 49, para 15634, Arthur Sterritt, pdf p 72, paras 15819-22, Cameron Hill [GCR Vol 3, Tab 34, pages 113, 137, 160]; Exhibit D71-8-3, pdf p 8 [GCR Vol 1, Tab 12, page 551]; Exhibit D71-9-7, pdf pp 12-3, 32 [GCR, Vol 1, Tab 13, pages 601-2, 621]; Exhibit D71-9-1 [GCR, Vol 1, Tab 14].

⁸² Inglis Affidavit, Exhibit C, pdf p 120 [GCR, Vol 2, Tab 25, page 24].

⁸³ Exhibit D71-11-1, pdf p 9 [GCR, Vol 1, Tab 1, page 9]; Transcript volume 24, pdf p 17, para 14684, Chief Robert Hill.

⁸⁴ Exhibit D71-11-1, pdf p 9 [GCR, Vol 1, Tab 1, page 9].

⁸⁵ *Ibid* pdf pp 9-10 [GCR, Vol 1, Tab 1, pages 9-10].

⁸⁶ *Ibid* pdf p 10 [GCR, Vol 1, Tab 1, page 10]; Hearing transcript Vol 24, pdf p 59, paras 15031-3, Helen Clifton [GCR Vol 3, Tab 33, page 59].

⁸⁷ Exhibit D71-11-1, pdf p 10 [GCR, Vol 1, Tab 1, page 10].

⁸⁸ *Ibid* pdf p 2 [GCR, Vol 1, Tab 1, page 2]; Hearing transcript Vol 24, pdf pp 17-8, paras 14687-9, Chief Robert Hill [GCR Vol 3, Tab 33, pages 17-8].

⁸⁹ Exhibit D71-11-1, pdf p 10 [GCR, Vol 1, Tab 1, page 10].

⁹⁰ *Ibid*; Hearing transcript Vol 24, pdf p 14, paras 14661-2, Chief Robert Hill, pdf pp 29-30, paras 14778-9, Chief Ernie Hill [GCR Vol 3, Tab 33, pages 14, 29-30];

of each house manages and governs all aspects of the house territory and is responsible for ensuring both the well-being of the house and the health of the territory.⁹¹ Under Tsimshian law, only the chief responsible for a house territory or someone authorized to speak on their behalf may speak to its ownership of the territory.⁹²

37. The acquisition of Tsimshian territory is described through formal oral histories called *adawx*, which describe ancient migrations of the house, the acquisition and defence of its territory, and major events during the life of the house, such as natural disasters and war.⁹³ Every generation of Tsimshian chiefs is responsible for ensuring full transmission of *adawx* to the next generation through a series of feasts, at which the *adawx* are made public and validated by other guest house chiefs, ensuring acknowledgement of territorial ownership by neighbouring communities.⁹⁴ For the most part, Tsimshian territories continue to belong to the earliest lineages to arrive in an area and once acquired under Tsimshian law, territories predominately remain in the hands of the original house group.⁹⁵

38. Claiming territories involves a surveying process called “walking the land” in which mountains, rivers, lakes and other areas are given highly descriptive names that reflect a detailed knowledge of the landscape.⁹⁶ Once land has been surveyed in this manner, a house hosted a feast to announce the group’s claim to the territory and its names, which would be acknowledged by guest chiefs of other houses to validate ownership of the territory and complete the process for establishing tenure.⁹⁷ Knowledge of the names of geographical features within the territories and their

Transcript Vol 25, pdf pp 51-2, para 15654, Arthur Sterritt [**GCR Vol 3, Tab 34, pages 139-40**].

⁹¹ Exhibit D71-11-1, pdf p 10 [**GCR, Vol 1, Tab 1, page 10**]; Hearing transcript Vol 24, pdf p 26, para 14752, Chief Albert Clifton, pdf p 30, paras 14781-4, Chief Ernie Hill, pdf pp 44-5, paras 14902-4, Arthur Sterritt [**GCR Vol 3, Tab 33, pages 26, 30, 44-5**]; Exhibit D71-8-3, pdf p 8 [**GCR Vol 1, Tab 12, page 551**]; Exhibit D71-9-7, pdf pp 11-2 [**GCR, Vol 1, Tab 13, pages 600-601**].

⁹² Exhibit D71-11-1, pdf p 10 [**GCR, Vol 1, Tab 1, page 10**]; Hearing transcript Vol 24, pdf pp 40-1, paras 14870-2, Chief Robert Hill & pdf p 43, paras 14888-9, Arthur Sterritt [**GCR Vol 3, Tab 33, pages 40-1, 43**].

⁹³ Exhibit D71-11-1, pdf p 10 [**GCR, Vol 1, Tab 1, page 10**].

⁹⁴ *Ibid*; Hearing transcript Vol 24, pdf pp 32-3, paras 14800-1, 14804, Chief Arnold Clifton [**GCR Vol 3, Tab 33, pages 32-3**].

⁹⁵ Exhibit D71-11-1, pdf p 11 [**GCR, Vol 1, Tab 1, page 11**].

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

historical origins is an important element in proof of ownership in the Tsimshian legal system.⁹⁸

39. Under Tsimshian law, Gitga'at's ownership and exclusive stewardship of house territories is not limited to terrestrial components; rather, it extends to both submerged and foreshore marine territories, such as halibut and cod beds, seaweed gathering spots, beachfronts for salvage, salmon streams, bathing places, and marine transportation and trade routes.⁹⁹

Exclusivity

40. As described above, the inalienable and exclusive title to house territories and resources has been starkly delineated in the Tsimshian legal system since long before contact with Europeans, with ownership of house territories and resources both communicated to and validated by neighbouring communities through the feast system. Under the Tsimshian legal system, territory could only be ceded to others in specific circumstances, such as when a house died out or when territory was relinquished to compensate the murder of an important chief.¹⁰⁰ Invasion of another's territory is illegal in the Tsimshian legal system and Tsimshian tribes who faced invasions in the past looked to neighbouring tribes for assistance in the defence of their territories;¹⁰¹ for example, Gitga'at historically drove the Wolf clan of Tlingit from their territory with the assistance of neighbouring tribes and nations.¹⁰² While title to house territories is exclusive, use of territory does not constitute proof of ownership in the Tsimshian legal system and therefore even today chiefs continue a long tradition of granting others permission to use their house territories, although groups still tend to use their own territories.¹⁰³

41. Not only has ownership of Gitga'at house territories been repeatedly described to neighbouring houses, tribes and nations through the feast system, but this has also been communicated to anthropologists, judges and royal commissions on aboriginal matters, as well as the JRP, through the naming of places and identifying of resources throughout Gitga'at's traditional territory.¹⁰⁴ For example, in the early 20th century Gitga'at resisted the reserve allotment process of the Royal Commission of Indian Affairs due to the Commission's inability to settle the issue of "Indian title" and on the basis that Gitga'at

⁹⁸ *Ibid.*

⁹⁹ Exhibit D71-7-7, pdf p 28 [GCR, Vol 1, Tab 11, page 443].

¹⁰⁰ Exhibit D71-11-1, pdf p 11 [GCR, Vol 1, Tab 1, page 11].

¹⁰¹ *Ibid.*

¹⁰² *Ibid* pdf pp 21-2 [GCR, Vol 1, Tab 1, pages 21-2]; Hearing transcript Vol 25, pdf pp 55-6, paras 15683-5, Arthur Sterritt [GCR Vol 3, Tab 34, pages 143-4].

¹⁰³ Exhibit D71-11-1, pdf p 7 [GCR, Vol 1, Tab 1, page 7].

¹⁰⁴ Exhibit D71-11-1, pdf p 11 [GCR, Vol 1, Tab 1, page 11].

owned its entire Traditional Territory and did not need to ask for any particular piece of land.¹⁰⁵ However, three subsequent requests were communicated to the Commission by a local reverend on behalf of Gitga'at, seeking the entirety of Gil Island for timber reserves, as well as the reserve of fish-bearing streams and a large hunting territory largely coextensive with the TCA.¹⁰⁶ In modern times, Gitga'at has also entered into modern agreements and protocols with fishing lodges, charter boats and whale watching businesses aimed at the sustainability and protection of its recognized Traditional Territory, including the TCA.¹⁰⁷ Furthermore, Gitga'at has entered into agreements and processes with the provincial government that recognize Gitga'at's interests and vision for the future of its Traditional Territory and the TCA, including a reconciliation protocol, a land use plan setting aside conservancies, and a marine use planning process.¹⁰⁸

42. Through its hereditary chiefs and band council, Gitga'at has entered into agreements and protocols with resource companies, universities, environmental organizations, and tourism operators aimed at ensuring adherence to Gitga'at policies, coordinated planning and information sharing, and collaborative, respectful and sustainable use of Gitga'at's Traditional Territory, including the TCA.¹⁰⁹ Gitga'at has also negotiated government-to-government decision-making processes with the federal and provincial governments that recognize Gitga'at's interests and vision for the future of its Traditional Territory and the TCA and work towards the reconciliation of Gitga'at's title, rights and interests with those of other governments.¹¹⁰ For example, Gitga'at has entered into reconciliation protocols and agreements aimed at creating consensus decision-making processes for the resources within its Traditional Territory

¹⁰⁵ Inglis Affidavit, Exhibit C, pdf p 123, Exhibit F, pdf pp 134, 136 [GCR, Vol 2, Tab 25, pages 27, 38, 40].

¹⁰⁶ *Ibid* pdf p 124, Exhibit D, pdf pp 128-132, Exhibit F, pdf pp 143 [GCR, Vol 2, Tab 25, pages 28, 32-6, 47].

¹⁰⁷ Hearing transcript Vol 24, pdf p 57, para 15019, Helen Clifton [GCR Vol 3, Tab 33, page 57].

¹⁰⁸ Hearing transcript Vol 25, pdf pp 77-80, paras 15865-84, Kyle Clifton [GCR Vol 3, Tab 34, pages 165-8].

¹⁰⁹ Hearing transcript Vol 24, pdf p 57, para 15019, Helen Clifton [GCR Vol 3, Tab 33, page 57]; Exhibit D71-8-3, pdf pp 38-9 [GCR Vol 1, Tab 12, pages 581-2]; Exhibit D71-8-4, pdf p 4 [GCR, Vol 1, Tab 15, page 692]; D-71-9-6, pdf pp 18, 30 [GCR, Vol 1, Tab 16, pages 695-6].

¹¹⁰ Hearing transcript Vol 25, pdf pp 77-80, paras 15865-84, Kyle Clifton [GCR Vol 3, Tab 34, pages 165-8]; Exhibit D71-8-4, pdf p 4 [GCR, Vol 1, Tab 15, page 692]; Exhibit D71-9-2 [GCR, Vol 1, Tab 17]; Exhibit D71-9-5, pdf p 4, 7-9 [GCR, Vol 1, Tab 18, pages 713, 716-8]; Affidavit of Dan Cardinall, affirmed February 3, 2015, pdf pp 2-6, paras 7-25, 30-5 [*Cardinall Affidavit*] [GCR, Vol 2, Tab 26, pages 724-8].

and the TCA;¹¹¹ and developed land and marine use plans to implement these protocol by communicating Gitga'at's development priorities and perspectives, and identifying specific areas and resources warranting protection or restrictions on access.¹¹² Furthermore, Gitga'at is engaged in the negotiation of land ownership, governance structures and compensation with the federal and provincial governments through the British Columbia Treaty Process as well.¹¹³ Through these ongoing processes and relationships, among others, Gitga'at continues to regularly assert, communicate and implement its aboriginal rights and title in its relations with other governments and third parties alike.

43. The above evidence of showing the sufficiency and exclusivity of Gitga'at's pre-sovereignty occupation of the TCA, including the continuity of its recent occupation with its past, is supplemented and confirmed by the affidavits of Gitga'at hereditary chiefs and knowledge holders filed in this application. Among other things, these affidavits further illuminate and support: the continuous maritime character of Gitga'at's manner of life and its relationship to its Traditional Territory and the TCA;¹¹⁴ Gitga'at's continuous hunting practices throughout both the inland and coastal portions of the TCA;¹¹⁵ the collective nature of Gitga'at's continuous governance, regular use and relationship to the TCA;¹¹⁶ the key importance of Gitga'at's use and occupation of

¹¹¹ Exhibits D71-8-2 [GCR, Vol 1, Tab 19]; D71-8-7 [GCR, Vol 1, Tab 3]; D71-8-8 [GCR, Vol 1, Tab 20]; D71-9-2 [GCR, Vol 1, Tab 17]; D71-9-5 [GCR, Vol 1, Tab 18]; Exhibit D71-8-4, pdf pp 4-5 [GCR, Vol 1, Tab 15, pages 693-3]; D-71-9-6, pdf p 18 [GCR, Vol 1, Tab 16, page 695]; Cardinall Affidavit, pdf pp 4-6, paras 19-25, 30-1 [GCR, Vol 2, Tab 26, pages 726-8].

¹¹² Exhibits D71-8-3 [GCR, Vol 1, Tab 12]; D71-9-7 [GCR, Vol 1, Tab 13]; D-71-9-6, pdf p 18 [GCR, Vol 1, Tab 16, page 695]; Cardinall Affidavit, pdf pp 3-6, paras 15-18, 23-25, 32-5 [GCR, Vol 2, Tab 26, pages 725-8]; Affidavit of Kyle Clifton, sworn February 3, 2015, pdf pp 3-6, paras 15-25 [GCR, Vol 2, Tab 27, pages 752-5].

¹¹³ Exhibit D71-8-3, pdf p 8 [GCR, Vol 1, Tab 12, page 551].

¹¹⁴ Affidavit of Henry Clifton, sworn February 3, 2015 pdf pp 2-5, paras 5, 12-9, 23-4, 26-8 [*Henry Clifton Affidavit*] [GCR, Vol 2, Tab 28, pages 757-60]; Affidavit of Allan Robinson, sworn February 3, 2015, pdf pp 2-4, paras 6-13, 15-20, 28 [*Robinson Affidavit*] [GCR, Vol 2, Tab 29, pages 764-6].

¹¹⁵ Henry Clifton Affidavit, pdf pp 5-7, paras 28-32, 35 [GCR, Vol 2, Tab 28, pages 760-2]; Robinson Affidavit, pdf p 5, para 29 [GCR, Vol 2, Tab 29, page 767].

¹¹⁶ Henry Clifton Affidavit, pdf pp 4 & 6, paras 19, 22-4, 32 [GCR, Vol 2, Tab 28, pages 759, 761]; Affidavit of Albert Clifton, sworn February 2, 2015, p 2, paras 5-7 [*Albert Clifton Affidavit*] [GCR, Vol 2, Tab 30, page 769]; Robinson Affidavit, pdf p 4, paras 26-27 [GCR, Vol 2, Tab 29, page 766].

its seasonal harvesting areas within the TCA to Gitga'at's culture and identity;¹¹⁷ Gitga'at's understanding of the exclusive nature of its ownership of the TCA and its Traditional Territory in general;¹¹⁸ and the ongoing application of ayaawk and other aspects of the Tsimshian legal system to the governance of Gitga'at society and Gitga'at's relationship to its Traditional Territory and the TCA.¹¹⁹ The affiant Gitga'at hereditary chiefs and knowledge holders also confirm the accuracy of the TCA as reflecting the core of Gitga'at's regular use and occupation of its Traditional Territory.¹²⁰

44. It is worthwhile at this point to recall the Supreme Court of Canada's caution that although "the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title," they "are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."¹²¹

45. The Applicant respectfully submits that in this case it has established Aboriginal title over the Title Claim Area or, alternatively, over portions thereof.

46. It also submits that given the evidence submitted in the JRP process or previously publically available (adduced above), by the end of the JRP process and thus prior to the GIC's Order, Canada had "real or constructive knowledge of ... the actual existence of [Gitga'at's] Aboriginal title"¹²² – "constructive knowledge" being knowledge of facts sufficient to put a reasonable person on notice or inquiry."¹²³

¹¹⁷ Henry Clifton Affidavit, pdf pp 4-6, paras 24, 26-7, 30-1 [GCR, Vol 2, Tab 28, pages 759-61]; Albert Clifton Affidavit, pdf p 2, paras 5, 7 [GCR, Vol 2, Tab 30, page 769]; Robinson Affidavit, pdf pp 2 & 4, paras 10, 25-26, 28 [GCR, Vol 2, Tab 29, pages 764, 766].

¹¹⁸ Robinson Affidavit, pdf p 5, para 30 [GCR, Vol 2, Tab 29, page 767]; Affidavit of Ernie Hill, sworn February 2, 2015, pdf pp 2-3, paras 8, 11 [*Hill Affidavit*] [GCR, Vol 2, Tab 31, pages 771-2].

¹¹⁹ Henry Clifton Affidavit, pdf p 2, 5, paras 3, 5, 26-7 [GCR, Vol 2, Tab 28, pages 757, 760]; Albert Clifton Affidavit, pdf pp 1-2, paras 3-4, 6 [GCR, Vol 2, Tab 30, pages 768-9]; Robinson Affidavit, pdf pp 2, 5, paras 4-5, 8, 30 [GCR, Vol 2, Tab 29, pages 764, 767]; Hill Affidavit, pdf pp 2-3, paras 8-11 [GCR, Vol 2, Tab 31, pages 771-2].

¹²⁰ Albert Clifton Affidavit, pdf p 2, para 7 [GCR, Vol 2, Tab 30, page 769]; Robinson Affidavit, pdf pp 4-5, paras 25, 29 [GCR, Vol 2, Tab 29, pages 766-7].

¹²¹ *Tsilhqot'in*, *supra* note 20 at 32.

¹²² *Ibid* at 78.

¹²³ *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 SCR 805, 1997 CanLII 334 at 48.

47. Provided that Gitga'at's evidence satisfied the test for title, Canada was not entitled to treat its recognition "merely as an act of grace and favour"¹²⁴ or "some holy grail which only judicial initiatives of the superior courts may touch."¹²⁵

48. Canada bears responsibility for any lack it had of real knowledge of the actual existence of Gitga'at title. From the beginning of its consultation process to the end, Canada brushed off Gitga'at's repeated requests to discuss the evidence in support of Gitga'at title and rights.¹²⁶ Likewise, although it had the opportunity within the JRP process (and afterward) to challenge or inquire about Gitga'at's evidence, it did not.

49. Thus, Gitga'at also submits that in the circumstances Canada had a constitutional duty to recognize and respect Gitga'at title and thus to not infringe it unjustifiably.

Infringement

50. Because Aboriginal title confers the right to exclusively occupy, enjoy and control how the land is used,¹²⁷ incursions on, use and exploitation of title territory by governments and others without consent of the title-holder constitutes infringement.¹²⁸

51. Gitga'at's description in its Final Argument to the JRP of the ways in which Canada's approval of the Project would infringe Gitga'at title is apt here:

279. First, approval of the Project potentially infringes their right to the exclusive use and occupation of the land. For instance, it will allow others, including the oil and condensate tanker owners who would be subserving the Proponent, to use the waters within the three main regions, as well as the broader Gitga'at territory, for transport. It even allows them a measure of occupation by granting them routes through the same. Allowing others to use and occupy Gitga'at title areas not only offends Gitga'at's right to exclusive use and occupation, it also introduces inconsistency and conflict with Gitga'at's own use and occupation, which reflect ancient patterns of use and occupation not only but especially in regard to the three main areas – inconsistency and conflict

¹²⁴ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79 at 75.

¹²⁵ *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 SCR 585, 2003 SCC 55 at 36.

¹²⁶ Arnold Clifton Affidavit paras 48, 56, 61, 63, 72-7, 98-9, 105, 122, Exhibits G, H, J, Q [GCR, Vol 2, Tab 24, pages 110, 112-7, 123-5, 129, 173-81, 184-90, 226-34]; D71-9-3 [GCR, Vol 1, Tab 24]; D71-9-8 [GCR, Vol 1, Tab 24].

¹²⁷ *Tsilhqot'in*, *supra* note 20 at 2, 15, 18, 75-6.

¹²⁸ *Ibid* at 73, 76, 97.

which will, should the Project go ahead, require Gitga'at's prior use and occupation to yield further to others' use and occupation.

280. Second, approval of the Project potentially infringes their right to choose to what uses the land and waters can be put. The federal assumption of discretion to decide whether the Project proceeds nullifies the Gitga'at's right to choose how its title land and waters will be used and thus denies any legal effect to their exercise of this right in coming to a decision to reject the uses to which Enbridge would have their land and waters to be put. Approval of the Project would also grant to Enbridge, the tanker owners, and others what the federal assumption of discretion denies to the Gitga'at, that is, the *legally recognized* right to make choices *with legal effect* in regard to the uses to which Gitga'at title land and waters can be put.

281. Because their title land and waters have economic value, the Gitga'at's right to choose to what uses their title land and water can be put includes the right to choose to what, if any, economic uses they are put. The Gitga'at are exercising this right by developing management and development plans consistent with Gitga'at laws and values and entering into agreements with the Crown and industry that acknowledge Gitga'at's authority in regard to uses of their territory. The Gitga'at have structured their exercise of this right in light of their laws and values. The Project entails uses of Gitga'at title land and waters that threaten Giga'at's vision of a sustainable and renewable economy that allows a place for non-Gitga'at people. This is a further way in which the Project would infringe Gitga'at title.

282. Approval of the Project also potentially infringes the Gitga'at's right to engage in economic activities on and in regard to their title land and waters. Many of the traditional activities the Gitga'at engage in within their territory, including the three main regions, have an economic dimension. These activities include harvesting and trading seafood. Enbridge's Project will, through just having their tankers operating there, interfere with many of these activities and thus will adversely affect their economic dimension. But it also has the potential to seriously disrupt these activities through oil spills with serious to dire economic consequences for the Gitga'at.

283. Its approval likewise potentially infringes the Gitga'at's right to enjoy the economic benefits derivable from their title land and waters. The use of their title lands and waters required by Enbridge's project has economic value. Thus, those who derive economic benefit from this use (e.g. governments collecting fees from tanker owners and bitumen purchasers not having to pay an increased

price referenced to the full economic value of the use of Gitga'at waters for tanker transport) are interfering with Gitga'at title. It should be added that tanker oil spills carry the potential to diminish, in some cases significantly diminish, the economic value of Gitga'at title land and waters.

284. Finally, approval of Enbridge's Project potentially infringes the Gitga'at's right to maintain their special connection to the land and waters, which connection has continued, since before the Crown's assertion of sovereignty, to be anchored in their physical occupation and structured by their social and cultural organization on the land and waters. Tanker oil spills in particular have the potential to disrupt and even destroy this connection and with it the Gitga'at people's distinctive identity and culture.¹²⁹

52. Giga'at respectfully submits, then, that it has shown title infringement.

Justification

53. To justify an infringement of Aboriginal title, that is, "[to] justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group....¹³⁰

54. Gitga'at submits that Canada's infringement was unjustified in all three respects. Although on the *Sparrow* analysis the burden of proving justification is Canada's, the Applicant offers the following brief remarks.

55. Granted that Canada should have known of the existence of Gitga'at title prior to the GIC's Order, it had a duty to consult in an effort to obtain Gitga'at's consent.¹³¹ Despite Gitga'at having proposed title-based "...discussions towards a just reconciliation of Gitga'at and Crown interests,"¹³² Canada never reciprocated. This failure suffices to render its infringement unjustified. (The Applicant will say more on Canada's approach to consultation in its discussion of the next point in issue.)

¹²⁹ D71-35-2 paras 279-284 [GCR, Vol 1, Tab 5, pages 206-7].

¹³⁰ *Tsilhqot'in*, *supra* note 20 at 77.

¹³¹ *Ibid* at 71, 76, 88, 90-1.

¹³² Arnold Clifton Affidavit paras 105-107, 111, Exhibit R, see also paras 87, 90-1, 102-3 [GCR, Vol 2, Tab 24, pages 119-21, 123-5, 127-8, 235-7].

56. Further, “[i]n keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required [as a part justification] when aboriginal title is infringed.”¹³³ Canada never offered Gitga’at compensation for its infringement.

57. As for the compelling and substantial objective of the government, it “...must be considered from the Aboriginal perspective as well as from the perspective of the broader public.”¹³⁴ Moreover, “[t]o constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.”¹³⁵

B. Whether Canada Breached its Duty to Consult and Accommodate

58. Gitga’at adopts the submissions of the Applicants Nadleh and Nak’azdli on the applicable standards of review in regard to consultation and accommodation.

59. Generally, the Crown’s duty to consult arises in the following circumstances: “Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right.”¹³⁶

60. The degree of consultation and accommodation required lies on a spectrum:

In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. ... The required level of consultation and accommodation is greatest where title has been established.¹³⁷

61. A spectrum of duties may even apply over time in a particular case, including within the same consultation context:¹³⁸

At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate,

¹³³ *Delgamuukw*, *supra* note 23 at 169.

¹³⁴ *Tsilhqot’in*, *supra* note 20 at 81.

¹³⁵ *Ibid* at 82.

¹³⁶ *Ibid* at 78.

¹³⁷ *Ibid* at 79. *Establishment* is not short for *establishment by court declaration*. It includes, eg, establishment by agreement (89, 90).

¹³⁸ *Haida Nation*, *supra* note 2 at 45.

accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.¹³⁹

62. The adequacy of Canada’s consultation and accommodation is ultimately judged against the honour of the Crown and the goal of reconciliation: “The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”¹⁴⁰

63. Thus, Canada’s duty to accommodate Gitga’at’s claimed Aboriginal title and rights required it to accommodate those interests “in the spirit of reconciliation”.¹⁴¹ Accordingly, it was required to “... [seek] compromise [with Gitga’at] in an attempt to harmonize conflicting interests and move further down the path of reconciliation.”¹⁴²

64. If the issue of unjustified title infringement doesn’t arise in this case,¹⁴³ Gitga’at advances a second, alternative ground for its application (including ground for an order setting aside the GIC’s Order¹⁴⁴):

In the alternative, the Governor in Council erred in law or jurisdiction by making the Order despite the Federal government having failed to uphold the honour of the Crown and promote the reconciliation of Gitga’at’s prior occupation and use of its territory with the Crown’s asserted sovereignty.... The Federal government failed in its duty in a number of ways, including by:

¹³⁹ *Tsilhqot’in*, *supra* note 20 at 91.

¹⁴⁰ *Haida Nation*, *supra* note 2 at 45; see also *Tsilhqot’in*, *supra* note 20 at 17.

¹⁴¹ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 at 32 [*Rio Tinto*].

¹⁴² *Haida Nation*, *supra* note 2 at 49, see also *Rio Tinto*, *supra* note 147 at 34, 61.

¹⁴³ In *Tsilhqot’in*, *supra* note 20, the Supreme Court of Canada granted a declaration of Aboriginal title over the area at issue. It further declared that the Province had breached its duty to consult. It stopped short of granting the sought-for declaratory relief concerning unjustified infringement (paras 9 & 153).

¹⁴⁴ “Where consultation *or* accommodation is found to be inadequate, the government decision can be suspended or quashed” (*Tsilhqot’in*, *supra* note 20 at 79; emphasis added).

- a. imposing an environmental assessment-consultation structure and process on Gitga'at and other Aboriginal communities that gave no or insufficient effect to section 35(1)'s promise of rights recognition and the goal of reconciliation;
- b. engaging with Gitga'at with no or insufficient regard for section 35(1)'s promise of rights recognition and the goal of reconciliation;
- c. failing to acknowledge that the strength of Gitga'at's title and rights claims had increased significantly as a result of Gitga'at's participation in the JRP process and the evidence it gave therein and, thus, that the increased strength of Gitga'at's claim required the Federal government to take particular care to preserve Gitga'at's Aboriginal interest pending final resolution of its claim;
- d. failing to show responsiveness subsequent to the JRP's Report to Gitga'at's request to take its title claim seriously and discuss Gitga'at's core concerns about the Project;¹⁴⁵

65. In short, Gitga'at submits, Canada did not consult with Gitga'at and accommodate Gitga'at's claimed title and rights "in the spirit of reconciliation".

66. The scope of Canada's duty to consult Gitga'at and accommodate its claimed title and rights is proportionate to and thus based on a preliminary assessment of (1) the strength of the case supporting the existence of Gitga'at's title and rights and (2) the seriousness of the potentially adverse effects upon the claimed title and rights resulting from approval of the Project.¹⁴⁶

67. As is clear from the above, by the close of the JRP process, the case supporting the existence of Gitga'at title (and other rights) was particularly strong.

68. Once the JRP's Report was released, if not before, it was clear that the *potentially* adverse effects on Gitga'at's claimed title and rights flowing from Federal approval of the Project ranged from minimal to exceedingly serious.¹⁴⁷

69. Although most, if not all, of the Project's *likely* adverse environmental effects on the Gitga'at Traditional Territory and people translate into *potentially* adverse effects on Gitga'at's claimed title and rights, the converse is not true. There are two reasons for this. First, Aboriginal title includes rights to occupy, use, enjoy and control territory. Gitga'at's ongoing, albeit limited, engagement in these activities may be interfered with, and thus its title interest adversely affected, without accompanying changes in the biophysical environment. Second, the category of "potentially adverse effects" is broader than the category of "likely adverse effects". Hence, a potentially adverse

¹⁴⁵ [CB, Vol 1, Tab 10, pages 199-200, para 61].

¹⁴⁶ *Haida Nation*, *supra* note 2 at 39.

¹⁴⁷ See the discussion of 3rd issue below.

impact on Gitga'at's title interest may be significant regardless of whether there are any accompanying changes in the biophysical environment or, if there are, whether they are, from an environmental assessment point of view, significant.

70. An “evidence-based” assessment¹⁴⁸ of the strength of Gitga'at's title and rights claims and the seriousness of the Project's potentially adverse effects on those claimed interests leads to the conclusion, the Applicant submits, that the scope of Canada's duty to consult and accommodate Gitga'at's title and rights interests was such that by the close of the JRP process Canada had a duty to take “appropriate care” to preserve Gitga'at's title interest pending final resolution of its claim.

71. There is no evidence Canada ever performed a preliminary assessment of the evidence in support of the existence of Gitga'at title and rights. Indeed the evidence suggests it never did.¹⁴⁹ Nor is there evidence it ever turned its consultative mind to the specific nature, scope and significance of Gitga'at's title and rights claims as articulated by Gitga'at.¹⁵⁰ Indeed the evidence suggests that Canada never moved beyond dealing with Aboriginal rights in abstraction from the specifics of the rights articulated by distinctive First Nations communities.¹⁵¹

72. Gitga'at's title interest includes a unique occupation interest with a historical collective dimension. Gitga'at's TCA is at the heart of its ancestral homeland. Preservation of Gitga'at's title interest therein thus requires preserving its suitability as the place where the Gitga'at people continue to *feel* at home, live in community and carry on their lives in direct contact with their land and sea. Related to this, Gitga'at's title interest has a non-economic¹⁵² as well as an economic aspect. Preservation of Gitga'at's title interest requires ensuring that its non-economic as well as economic¹⁵³ benefits are still there for future generations to fully enjoy.

73. In the circumstances, although there was no duty to agree, Canada's post-JRP duty to consult *and* accommodate did require it to engage in a “give and take” with Gitga'at,

¹⁴⁸ *Haida Nation*, *supra* note 2 at 36.

¹⁴⁹ Arnold Clifton Affidavit, paras 73, 99, Exhibit Q [GCR, Vol 2, Tab 24, pages 116, 123, 226-34].

¹⁵⁰ *Haida Nation*, *supra* note 2 at 36, 44.

¹⁵¹ Arnold Clifton Affidavit, Exhibit II [GCR, Vol 2, Tab 24, page 702].

¹⁵² *Delgamuukw*, *supra* note 23 at 129.

¹⁵³ For Gitga'at, the economic benefits include most importantly the continuation of traditional non-market economic activities (D71-7-3 pdf 4-5, 15-18, 74-5 [GCR, Vol 1, Tab 21, pages 792-3, 796-801]).

to seek “compromise in an attempt to harmonize conflicting interests,” to try to reach agreement, and so to “move further down the path of reconciliation”.¹⁵⁴

74. Canada never engaged in a “give and take” with Gitga’at, nor sought compromise in an attempt to harmonize conflicting interests, nor tried to reach agreement. Canada never acknowledged much less reciprocated Gitga’at’s overtures.¹⁵⁵

75. Ultimately, Canada is unable to point to an accommodation of Gitga’at that has reference to the nature, scope and significance of Gitga’at’s title and rights claims as articulated by Gitga’at in the JRP and larger consultation process. The Applicant submits that Canada cannot be said to have reasonably accommodated Gitga’at’s title and rights claims in the face of its failures to acknowledge the nature, scope and significance of the title and rights claims as articulated by Gitga’at and, thus, to fashion an accommodation in reference to them.

76. Based on its initial discussions with Canada about the design of the consultation process proposed by Canada, with Canada’s stated intention to rely on the JRP process to the extent possible to meet its duty to consult and accommodate, Gitga’at had early-on drawn the conclusion that the proposed – and then soon to be imposed - process would not take Gitga’at’s rights seriously and thus would not “comply with the Crown’s constitutional obligations to Gitga’at and other First Nations.”¹⁵⁶

77. As Chief Arnold Clifton subsequently observed,

... the Federal government was [clear] at the start that it believed it had settled upon a process that, if things went as it hoped, would allow it to fulfill its duty to consult us and accommodate our rights without actually having to deal directly or specifically with our Aboriginal title and rights.¹⁵⁷

78. To answer what the Supreme Court of Canada calls “the controlling question in all situations”, Canada’s consultation and accommodation process and efforts failed to maintain the honour of the Crown and to effect reconciliation between the Crown and Gitga’at with respect to Gitga’at’s title and rights interests. By the time that the GIC made its Order in 2014, the Crown and Gitga’at had moved no further down the path of reconciliation than where they were at beginning, roughly 5 ½ years earlier. The basic

¹⁵⁴ *Haida Nation*, *supra* note 2 at 14, 42, 48-50.

¹⁵⁵ Arnold Clifton Affidavit, paras 104-107, Exhibit R [GCR, Vol 2, Tab 24, pages 124-5, 235-7].

¹⁵⁶ *Ibid* paras 34-53, Exhibits E, G [mistakenly “H” in affidavit] [GCR, Vol 2, Tab 24, pages 107-11, 148-58, 173-8]

¹⁵⁷ *Ibid* para 44 [GCR, Vol 2, Tab 24, page 109].

reason for this is, Gitga'at submits, that Canada approached its duty to Gitga'at without either a commitment to its constitutional promise to recognize - including a willingness to take progressive steps towards fulfilling its promise to recognize - Gitga'at's title and rights or the constitutionally animating spirit of reconciliation.

C. Whether the JRP Acted Inconsistently with Section 35

79. Gitga'at seeks a declaration that the JRP was subject to constitutional obligations in its dealings with Gitga'at. The JRP's failure to fulfill these obligations forms the chief basis for Gitga'at's requested relief in the form of orders either quashing the JRP Report or referring it back to the JRP for reconsideration.

80. Gitga'at's request for a declaration that the JRP Report does not comply with the requirements of its governing statutes and constituting documents, and is therefore invalid and unlawful in whole or in part also stems from this overarching constitutional error.¹⁵⁸

81. Gitga'at submits that the JRP specifically erred in law or jurisdiction by:

- a. failing to recognize and assess (including give proper weight to), or unreasonably assessing Gitga'at's aboriginal perspective on various aspects of the environment and the Project's effects, including the significance and mitigation of those effects;
- b. treating Gitga'at's evidence as inferior without reason;
- c. failing to assess or recommend mitigation measures proposed by Gitga'at; and,
- d. failing to fulfill its informational obligations arising from the Crown's reliance on the JRP process to assist in meeting the duty to consult.

Section 35 applies to the JRP

82. Generally, quasi-judicial review tribunals like the JRP must act "in accordance with the dictates of the Constitution, including subsection 35(1) thereof".¹⁵⁹

83. Although the JRP is not itself responsible for a failure of the Crown to adequately consult and accommodate Gitga'at, regulatory review processes such as the JRP process play an inextricable part of consultation and are supposed to be "a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it."¹⁶⁰

¹⁵⁸ Gitga'at Notice of Application, p 3 [CB, Vol 1, Tab 6, page 84].

¹⁵⁹ *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, [2009] FCJ No 1434 (QL), 2009 FCA 308 para 36, [*Standing Buffalo*], leave to appeal to SCC refused, 33482 (December 2, 2010).

¹⁶⁰ *Ibid* para 44.

84. The JRP knew, pursuant to the preamble of the Amended JRPA, that the Crown would be relying heavily on the JRP process to help fulfill its own constitutional duties. Gitga'at also held a legitimate expectation that its significant efforts in explaining its aboriginal perspective to the JRP at the Crown's urging,¹⁶¹ would both be reciprocated in the efforts of the Crown (as described above) as well as have an effect on the JRP's recommendation and be reflected in the JRP's reasons.

85. Therefore, on top of explicit statutory requirements that made the JRP process the information gathering and recommendation component to the GIC's final decision, the JRP was required not just to gather and incorporate information on all of Gitga'at's concerns, but also to give equal weight to Gitga'at's perspective, and to incorporate accommodations of Gitga'at's concerns into its recommendations. Gitga'at submits that it was thus not open to the JRP to state Gitga'at's concerns, then leave them out of its own analysis, to the extent that those concerns were within its jurisdiction.

86. Gitga'at relies on the submissions of Unifor regarding the applicable standard of review and submits that whether the JRP contravened section 35 of the *Constitution Act, 1982* is one of the issues subject to the correctness standard.¹⁶² Gitga'at adds that any expertise of the JRP in matters of a technical nature, do not entitle it to deference in regards to whether its findings incorporate Gitga'at's perspective.¹⁶³

87. In the alternative, at a minimum, the JRP's decision to recommend approval was required to fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".¹⁶⁴ In other words, this Court should intervene with the JRP's decision if it finds that, *inter alia*, the decision had no reasonable basis in fact; which is tantamount to an absence of good faith.¹⁶⁵

88. Under any standard of review, Gitga'at submits that the JRP erred by making a recommendation (and the GIC erred by deciding to adopt the JRP's recommendation) that does not have a reasonable basis in fact, taking into account the Project's potential to interfere with Gitga'at's constitutionally protected title and rights.

Section 35 Required Giving Equal Weight to Gitga'at's Perspective

¹⁶¹ Aboriginal Consultation Framework for the Northern Gateway Pipeline Project, Exhibit B174-8 [MB, Vol 1, Tab 3, pages 81-6].

¹⁶² *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 58.

¹⁶³ *Ibid* paras 48-49.

¹⁶⁴ *Ibid* para 47.

¹⁶⁵ *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418, para 76; *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 paras 31, 107, [2014] FCJ No 515 (QL).

89. As described above in Part A, the Supreme Court of Canada has consistently upheld the importance of having due regard for the Aboriginal perspective in working towards the grand purpose of section 35: reconciliation. Former Chief Justice Lamer held that “a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each”¹⁶⁶. Gitga’at submits that this requirement extends to the JRP as a quasi-judicial tribunal subject to the dictates of section 35 with jurisdiction to make recommendations regarding potential impacts on aboriginal rights.

90. Although the JRP declined to assess the Crown’s consultation, it did purport to assess the Project’s impacts on Aboriginal interests in general.¹⁶⁷ Notably, the JRP’s statement of the goals of aboriginal consultation¹⁶⁸ fell short of acknowledging the goal of reconciliation, a word that is absent from the entire JRP Report.

91. The JRP failed to give equal weight to Gitga’at’s perspective by: failing to collect the requisite facts and bypassing analysis of issues of core importance to Gitga’at; failing to adopt a precautionary approach to uncertainty regarding issues of significance to Gitga’at; failing to recommend reasonable mitigation measures proposed by Gitga’at; and, failing to explicitly account for Gitga’at’s constitutionally protected rights within its public interest determination.

92. At the very least, the JRP failed in its statutory requirement to provide reasons. The JRP thereby left a wide gap in what section 35 required, which the GIC did not fill through additional reasonable mitigation measures or reasons addressing how it considered Gitga’at’s perspective on issues of core importance to Gitga’at.¹⁶⁹

Failure to Assess Issues of Core Importance to Gitga’at

93. Gitga’at relies on the submissions of: Haisla in Part B of its memorandum of fact and law regarding the JRP’s failure to assess environmental effects as required under section 5(1)(c) of *CEAA, 2012*; BC Nature with regard to the JRP’s errors in assessing

¹⁶⁶ *Delgamuukw*, *supra* note 23, *aff’g Van der Peet*, *supra* note 20, paras 49-50. See also *Mikisew Cree First Nation v Canada*, [2005] 3 SCR 388, 2005 SCC 69, para 1.

¹⁶⁷ JRP Report, Vol 2, pp33-57 [**CB, Vol 2, Tab 21, pages 465-489**]; Gitga’at relies on the memorandum of Haisla regarding the JRP’s failure to assess the significance of adverse effects on aboriginal rights (Issue B.4).

¹⁶⁸ JRP Report, Vol 2, p33 [**CB, Vol 2, Tab 21, page 465**].

¹⁶⁹ Gitga’at relies on the memoranda of ForestEthics et al (Issue 4) and Haisla (Issue F) regarding why the GIC was required to and failed to provide adequate reasons.

effects of accidents and malfunctions; and of Forest Ethics et al. with regard to the effects of a spill of diluted bitumen.

94. Gitga'at adds that certain potential effects to Gitga'at covered by section 5(1)(c) of *CEAA, 2012* were similarly unlawfully disregarded by the JRP, and further submits that this failure is compounded in this case because it also represents a failure to incorporate Gitga'at's aboriginal perspective into the process, as required by section 35 of the *Constitution Act, 1982*.

95. One of the basic goals of the EA process writ large is to ensure early identification and evaluation of "all potential environmental consequences of a proposed undertaking".¹⁷⁰ Not every hypothetical environmental effect is considered "when it is known and proposed that such effects can and will be mitigated by appropriate measures."¹⁷¹

96. The JRP chose to scope its assessment by focusing on VECs.¹⁷² Gitga'at does not take issue with that general approach, but submits that in failing to include as VECs and therefore propose mitigation measures to protect, some of the cultural key-stone species or other indicators of particular concern to Gitga'at,¹⁷³ the JRP failed to ensure that the Crown would have sufficient scientific evidence on those issues which were of core importance to Gitga'at and which therefore the Crown was required to at least attempt to reach agreement on during its consultations with Gitga'at.

97. Gitga'at presented the JRP with evidence that its core concerns with the Project included, among other things: liability to Gitga'at for losses caused by the Project;¹⁷⁴ threats to Gitga'at culture and identity¹⁷⁵ and the use of Gitga'at marine and land resources in a manner consistent with Gitga'at customs, laws and traditions;¹⁷⁶ threats to Gitga'at's population in Hartley Bay; negative impacts on the social structure and

¹⁷⁰ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110, para 95.

¹⁷¹ *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, [2001] 2 FCR 461, 2001 CanLII 22029 (FCA) [*Bow Valley*] at 38, aff'g *Alberta Wilderness Assn v Express Pipelines Ltd*, (1996), 137 DLR (4th) 177 (FCA), p182.

¹⁷² JRP Report, Vol 1, pdf p62 [**CB Vol 1, Tab 20, page 413**].

¹⁷³ Exhibit D71-7-7 [**GCR Vol 1, Tab 11**]; Exhibit D71-5-1, parts 8, 9, and 13 [**GCR Vol 1, Tab 22, pages 803-9**]; Exhibit D71-21-1 [**GCR Vol 1, Tab 23**]; Exhibit D71-18-2 [**GCR Vol 1, Tab 24**]; Exhibit D71-35-2 para 53 [**GCR Vol 1, Tab 5, page 146**].

¹⁷⁴ Exhibit D71-35-2 para 97(d) [**GCR Vol 1, Tab 5, page 163**].

¹⁷⁵ Exhibit D71-7-7, pp 8, 54 and 61 [**GCR Vol 1, Tab 11, pages 423, 469, 476**].

¹⁷⁶ Exhibit D71-7-2, p78 [**GCR Vol 1, Tab 8, page 339**]; Exhibit D71-7-7, pp 6-9 [**GCR Vol 1, Tab 11, pages 421-4**].

interactions among those remaining in Hartley Bay;¹⁷⁷ reductions in the availability of traditional foods to Gitga'at persons residing in Prince Rupert living below the poverty line;¹⁷⁸ a decrease in socialization experiences for Gitga'at children to learn traditional skills, values and norms;¹⁷⁹ exacerbation of the existing high levels of stress among the Gitga'at created by the Project announcement and the already existing low levels of perceived Gitga'at self-efficacy;¹⁸⁰ negative impacts on Gitga'at's ability to attract investment in conservation financing and ecosystem service projects and to gain funding for other conservation-related and sustainable economic initiatives;¹⁸¹ cumulative threats to marine mammals due to vessel strikes;¹⁸² and, the exacerbation of these negative impacts in the event of oil spills of different sizes, whatever their likelihood.¹⁸³

98. The JRP was aware of Gitga'at's position that NGP did not "take into consideration the fundamental values of the Gitga'at, including their identity and worldview".¹⁸⁴ Gitga'at told the JRP that its understanding of culture was not captured in NGP's overly simplistic metrics. Two further metrics of culture of importance to the Gitga'at were excluded in NGP's assessment due to "lack of measurable parameters and data", despite the fact that the Tsimshian (including the Gitga'at) cultural world has been well researched and documented for more than a century.¹⁸⁵ Nevertheless, the JRP failed to impose accommodative requirements in order to collect sufficient information for its, or the GIC's information.

99. The JRP summarized some of Gitga'at's evidence,¹⁸⁶ but in providing its own views, wrote in generalities about aboriginal groups which "showed no cognizance of

¹⁷⁷ Exhibit D71-7-2, pdf pp 5-10 [GCR Vol 1, Tab 8, pages 250-5].

¹⁷⁸ Exhibit D71-7-3, p 6 [GCR Vol 1, Tab 21, page 795].

¹⁷⁹ Exhibit D71-7-7, p7 [GCR Vol 1, Tab 11, page 422].

¹⁸⁰ Exhibit D71-7-2, pdf pp 4-10 [GCR Vol 1, Tab 8, pages 249-55].

¹⁸¹ Exhibit D71-7-3, pdf p 6-7 [GCR Vol 1, Tab 21, pages 794-5].

¹⁸² JRP Report, Vol 2, pdf p242 [CB, Vol 2, Tab 21, CB page 674]; Exhibit D71-7-4, pdf pp 10-11 [GCR Vol 1, Tab 6, pages 240-1].

¹⁸³ Exhibit D71-35-2, especially paras 150-256 [GCR Vol 1, Tab 5, pages 176-201].

¹⁸⁴ JRP Report, Vol 2, pdf p303 [CB, Vol 2, Tab 21, CB page 735].

¹⁸⁵ Exhibit D71-7-7, p4 [GCR Vol 1, Tab 11, page 419]; Exhibit D71-35-2, para 97 [GCR Vol 1, Tab 5, page 163].

¹⁸⁶ JRP Report, Vol 2, pdf p45, 54, 98, 130, 150, 153, 190-1, 238, 242-3, 245, 247, 257, 259, 261, 271, 274-5, 282, 286, 298-9, 303, 310-12, 316, 366 [CB, Vol 2, Tab 21, pages 477, 486, 530, 562, 582, 585, 622-3, 670, 674-5, 677, 679, 689, 691, 693, 703, 706-7, 714, 718, 730-1, 735, 742-4, 748, 798].

the distinctive nature of the Gitga'at way of life or the textures of the evidence presented".¹⁸⁷

100. The JRP Report does not say how Gitga'at's evidence influenced the JRP's recommendations, other than to suggest that concerns of Aboriginal groups influenced some common sense safety standards. However, none of the conditions ensure that Gitga'at's title and rights will be protected in the event of an oil spill of any size or provide for appropriate compensation for cultural impacts in the event of a spill.¹⁸⁸ The JRP did not acknowledge Gitga'at's substantial investments in planning and developing its sustainable economy and the amount of effort it put into negotiating agreements, or the legitimate expectations those agreements created, and failed to recommend conditions to protect Gitga'at's right to make decisions regarding its economy.

101. In terms of cultural impacts, the JRP ignored Gitga'at's actual cultural worldview and preferred NGP's approach to assessing potential impacts on Aboriginal interests which was to assess instead the Project's impacts on resources and the ecosystems that support them.¹⁸⁹

102. For example, in its significance assessment, the JRP found that the Project's routine operations would cause temporary adverse impacts to some Aboriginal groups, and that a large oil spill would cause significant adverse effects on lands, waters, or resources used by Aboriginal groups because of reduced or interrupted access to resources used for traditional purposes. In contrast, the JRP did not offer any reasons for its finding that the stress or social impacts caused by the Project to Gitga'at would not be significant.¹⁹⁰

103. The JRP stated it "does not share the view of some Aboriginal groups that the impacts associated with this project during ... routine operations would eliminate the opportunity for Aboriginal groups to maintain their cultural and spiritual practices...".¹⁹¹ This is a misapprehension of the evidence because it was not Gitga'at's "view" that routine operations would "eliminate" opportunities to maintain Gitga'at's cultural practices. It was Gitga'at's sworn and uncontradicted *evidence* that routine

¹⁸⁷ Arnold Clifton Affidavit, paras 54-7, Exhibit "R" [GCR Vol 2, Tab 24, pages 111-2, 235-7]; Exhibit D71-9-3 [GCR Vol 1, Tab 2]; eg JRP Report, Vol 2, pdf pp313-14 [CB, Vol 2, Tab 21, CB page 745-5].

¹⁸⁸ See Hearing transcript, Vol 78, para 26011 [GCR Vol 3, Tab 35, page 188]; cf Arnold Clifton Affidavit, Exhibit T, pdf pp147, 151, Figure ES-4 [GCR Vol 2, Tab 24, pages 247, 251].

¹⁸⁹ JRP Report, Vol 2, pdf pp48-50 [CB, Vol 2, Tab 21, pages 480-2].

¹⁹⁰ JRP Report, Vol 2, pdf p50 [CB, Vol 2, Tab 21, page 482].

¹⁹¹ JRP Report, Vol 2, pdf p49 [CB, Vol 2, Tab 21, page 481].

operations would *likely disrupt* Gitga’at’s cultural practices, which includes Gitga’at’s relationship to a healthy environment that is perceived to be clean, in a way that is significant to Gitga’at.¹⁹²

104. The JRP did not comment on the potential impacts of the project on Gitga’at’s governance, cultural or any non-subsistence use rights.¹⁹³ Other than noting that Gitga’at gave evidence of its concerns, the JRP does not refer to or otherwise engage with that evidence of impacts in its own analysis, or give reasons as to why it did not find that evidence credible or why it should otherwise be rejected or given no weight.¹⁹⁴

105. Therefore, either the JRP erred in law by failing to meet its statutory duty to provide the GIC with sufficient information on which to base consultation, or else the GIC failed to indicate through its reasons that it did indeed consider these additional relevant considerations as required.¹⁹⁵

106. Gitga’at adds that certain failures to address some of the effects that were supposed to be assessed under section 5 of *CEAA, 2012*, may have been bypassed by the JRP due to its reliance on, for example, one key logical fallacy and an unreasonable assumption. Gitga’at submits that the JRP acted unreasonably by:

- a) assuming that routine operations could not have likely significant adverse effects on Gitga’at because there were no likely significant adverse environmental effects to biophysical resources used by Gitga’at; and,
- b) assuming that likely cumulative effects of the Project were not adverse despite evidence to the contrary, and thereby omitting any assessment of their significance.

Equating Biophysical Impacts with Human Impacts

107. Without explanation, the JRP accepted NGP’s suggestion that changes that the Project may cause to the environment with adverse effects on aboriginal peoples cannot be more significant than the Project’s biophysical “environmental effects”.¹⁹⁶

108. The JRP illogically assumed that just because the “environmental effects” of the Project were determined to be insignificant, or significant but un-likely,¹⁹⁷ they were automatically unlikely to cause changes in the environment with significant adverse

¹⁹² Exhibit D71-7-3, p5 [GCR Vol 1, Tab 21, page 794].

¹⁹³ JRP Report, Vol. 2, pdf p. 47 [CB, Vol 2, Tab 21, page 479].

¹⁹⁴ *CEAA, 2012*, s 43(1).

¹⁹⁵ *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 para 79, [Pembina].

¹⁹⁶ JRP Report, Vol 2, pdf pp 48-50 [CB, Vol 2, Tab 21, CB page 480-2].

¹⁹⁷ Gitga’at relies on the submissions of BC Nature regarding the JRP’s conflation of its duty to consider effects that “may” occur with its likelihood assessment.

effects to Gitga'at's health and socio-economic conditions; physical and cultural heritage; or its current use of lands and resources for traditional purposes.¹⁹⁸

109. This error in the JRP's significance assessment was compounded by its lack of explanation for why effects counting as "widespread" and significant from Gitga'at's perspective¹⁹⁹ would not be significant because of their limited geographic scope, despite its finding that the effects of a major oil spill on lands, waters and resources used by Aboriginal groups would be significant and adverse and in unspecified "rare cases", impacts to unspecified localized populations could be permanent.²⁰⁰

110. As a result of this faulty logic, the JRP summarized some of Gitga'at's evidence on matters of importance such as socio-economic effects,²⁰¹ but did not mention its own views of the evidence, nor provide conditions that would mitigate those effects.

Unreasonably Assumed Cumulative Effects were Not Adverse

111. Gitga'at asked the JRP to consider its evidence regarding the cumulative socio-cultural impacts it has endured, including disease epidemics, overfishing followed by over-regulation of fishing resources, loss of self-determination, and 'cultural genocide' through the Canadian residential school program.²⁰²

112. However, the JRP failed to do so as a result of mischaracterizing adverse cumulative effects as reasons why the Project would not have adverse impacts.²⁰³

113. For example, in dealing with evidence about adverse effects on stress levels of coastal First Nations, in one paragraph, the JRP acknowledged that the Project will increase stress on coastal First Nations, but then finds that because there is currently "large vessel traffic" off the west coast of Canada, therefore the Project is compatible with Aboriginal use of the waters for traditional purposes, without explaining how or

¹⁹⁸ Arnold Clifton Affidavit, para 50, Exhibit "H" [GCR Vol 2, Tab 24, page 110-1, 17981].

¹⁹⁹ Exhibit D71-35-2, para 200 [GCR Vol 1, Tab 5, page 187].

²⁰⁰ JRP Report, Vol 1, pdf p 26, 30, 69 [CB, Vol 1, Tab 20, pages 377, 381, 420].

Similar logical fallacies have been criticized by courts, eg *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 9379 (FCA), [2000] 2 FC 263, at para 39, Rothstein JA, application for leave to appeal to the Supreme Court of Canada dismissed.

²⁰¹ JRP Report, Vol. 2, pdf p286, 298-9 [CB, Vol 2, Tab 21, page 718, 730-1].

²⁰² Exhibit D71-7-2, pp i and 6-8, pdf pp 2, 22-4 [GCR Vol 1, Tab 8, pages 247, 267-9].

²⁰³ JRP Report, Vol 2, pdf pp 48, 130 [CB, Vol 2, Tab 21, pages 480, 562].

whether the increased stress can be mitigated, or assessing how significant the increased stress is and how it relates to cultural and spiritual practices.²⁰⁴

114. This is contrary to Gitga’at’s evidence about cumulative effects as well as being contrary to guidance on significance determinations stating that: “the adverse environmental effects may be significant if they occur in areas or regions which have already been adversely affected by human activities; and/or are ecologically fragile and have little resilience to imposed stresses.”²⁰⁵

Gitga’at Emphasized a Precautionary Approach

115. In addition to its failure to give Gitga’at’s perspective equal weight in determining which effects are adverse, Gitga’at submits that the JRP was required to, and did not, give Gitga’at’s perspective equal weight and nor did it err on the side of precaution in making its findings as to what is an acceptable level of risk of harm to Gitga’at (in other words, its determination of which adverse effects are likely); which adverse effects to Gitga’at are “significant”; and what constitutes a “precautionary approach” to mitigating risks of harm to Gitga’at.

116. Gitga’at submits that the finding by the JRP that the Project would not likely have significant adverse effects on Aboriginal groups is unreasonable in respect to Gitga’at in light of the evidence before the JRP, and given that it was required to assess significance with due regard for Gitga’at’s Aboriginal perspective.

117. Gitga’at relies on the submissions of Forest Ethics etc. in submitting that the JRP erred in failing to cautiously ensure mitigation of effects related to the behaviour of diluted bitumen in light of evidence suggesting a high level of uncertainty regarding those potential effects. Gitga’at adds that the JRP’s failure to apply the precautionary principle in its recommendations related to this matter was also a failure to take into account Gitga’at’s perspective about what constitutes “scientific uncertainty”, in other words, risk, of a level that requires invoking the precautionary principle.

118. The inclusion of the precautionary principle into the purposes of *CEAA, 2012*, as well as its adoption into Canadian common law through its emergence as a principle of international law have made it mandatory for the JRP to apply the precautionary principle in making its recommendation in the face of scientific uncertainty regarding

²⁰⁴ JRP Report, Vol 2, pdf pp 48, 239, 242, 244, emphasis added [CB, Vol 2, Tab 21, pages 480, 671, 674, 676].

²⁰⁵ *Bow Valley*, *supra* note 180, para 49.

whether potential effects are: adverse, neutral or beneficial; likely or unlikely; significant or insignificant; and whether proposed mitigation measures will be effective.²⁰⁶

119. It follows that where there is scientific certainty of threats of serious or irreversible adverse effects, then precaution must also be adopted, with the justification decision left to the GIC, as submitted by BC Nature. In other words, if the JRP, giving equal weight to Gitga'at's perspective, finds scientific uncertainty about any threat of potential serious or irreversible effects, then its range of reasonable options includes: sending the issue back for more study prior to recommending approval, devising a condition that would, with scientific certainty, eliminate the threat; or recommending denial of the Project approvals until scientific certainty that there will not be serious or irreversible effects is reached.

120. The precautionary principle recognizes the reality that adverse effects such as species extinction can be irreversible, unlike economic activity which can be conducted in potentially limitless different ways, bounded only by the human ingenuity needed to find solutions without potentially permanent adverse effects. Gitga'at's perspective on risk is particularly credible because it has experience and success developing such a sustainable economy. The precautionary principle takes on especial importance when it comes to Gitga'at's rights because of the constitutional limit not to take actions on Aboriginal title lands that would substantially deprive future generations of the benefit of that land. In Gitga'at's view, invoking the precautionary principle to protect aboriginal title and rights is of paramount importance in achieving reconciliation.

121. In terms of likelihood and significance, the definition of the precautionary principle adopted into Canadian law includes a description of the relevant burden of proof as well as which hypothetical effects it applies to. The principle applies where there is a threat of either serious or irreversible damage and the evidence of that threat has not reached the level of "full scientific certainty". Its application is not limited to effects that are proven on the balance of probabilities or are "likely", but merely "threatened". It also does not apply to every hypothetical effect, but only if the threat is of serious or irreversible damage, both of which could be considered "significant".

122. In this particular case, Gitga'at further emphasized the need for a precautionary approach by telling the JRP that NGP failed to include the impacts of increased perceptions of risk on economic values and community wellbeing. As discussed above, Gitga'at recommended mitigation measures to address this concern.²⁰⁷ The JRP did not

²⁰⁶ *Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc.*, 2015 FC 575, paras 41-8.

²⁰⁷ Exhibit D71-35-2, Appendix A, pp81-2 [GCR Vol 1, Tab 5, pages 213-4].

make any findings about whether the Project's impacts on Gitga'at's perceptions of risk could seriously or irreversibly threaten Gitga'at's ability to maintain its cultural practices and home in Hartley Bay,²⁰⁸ nor did it take a precautionary approach by requesting further information or imposing mitigation measures that would reduce perceptions of risk, nor did it explain why perceptions that an 18.2 percent risk of an oil spill is unacceptable were unreasonable. Instead, the JRP found that it was not able to quantify how a spill could affect values and perceptions, and made a finding of no significant likely adverse impacts to Aboriginal people in general.²⁰⁹

123. The JRP also found that scientific uncertainty existed regarding effects on eulachon and marine mammals including killer whales; for the behaviour of diluted bitumen in water; the toxic effects of a diluted bitumen spill; and the time it takes to recover from an oil spill.²¹⁰ Even if it had not made such findings, the credible, scientific evidence before the JRP conflicted regarding calculating residual effects and recovery times which Gitga'at urged the JRP to treat with precaution in its Final Argument.²¹¹

124. Gitga'at submits that the need to err on the side of caution applies to the JRP's significance assessment.²¹² The JRP failed to err on the side of environmental protection by recommending findings of significance, instead finding that mitigation in the form of further study was "precautionary", and accepting mitigation measures that would merely avoid adverse effects "to the greatest extent possible".²¹³

125. In contrast, the JRP recognized "uncertainties related to the effectiveness of" potential mitigation of the Project's potential effects on certain woodland caribou and grizzly bears, which led the JRP to "take a precautionary approach and recommend a

²⁰⁸ Exhibit D71-7-2, p45 [GCR Vol 1, Tab 8, page 306]; *ibid* paras 167, 220 [GCR Vol 1, Tab 5, pages 180, 191-2].

²⁰⁹ JRP Report, Vol 1, pdf p74 [CB, Vol 1, Tab 20, page 425], Vol 2, pdf p135-8 [CB, Vol 2, Tab 21, pages 567-570].

²¹⁰ JRP Report, Vol 1, pdf p57-8, 70 [CB, Vol 1, Tab 20, page 408-9, 421]; Vol 2, pdf p106, 108, 137, 170, 193 [CB, Vol 2, Tab 21, pages 538, 540, 569, 602, 625].

²¹¹ Exhibit D71-35-2 para 54(c) [GCR Vol 1, Tab 5, page 147].

²¹² See *Haida Nation*, *supra* note 2, paras 44, 63: where the significance of the infringement *to* the Aboriginal peoples is used to gauge the seriousness of the infringement, and the government's conception of the seriousness of the infringement is a question of law reviewable on the correctness standard.

²¹³ JRP Report, Vol 1, pdf p 62 [CB, Vol 1, Tab 20, page 413]; JRP Report, Vol 2, pdf pp 248-251 [CB, Vol 2, Tab 21, pages 680-683].

finding of significance”.²¹⁴ The JRP did not explain why it dealt with these areas of scientific uncertainty so differently, despite Gitga’at’s perspective on their significance.

126. Gitga’at is not suggesting that it was the duty of the JRP to eliminate all uncertainty. Rather, when faced with uncertainty, it was required to take a precautionary approach. The JRP’s failure to properly acknowledge where scientific uncertainty exists through its significance determination and failing to incorporate Gitga’at’s perspective on that issue resulted in a failure to ensure that the GIC had the necessary factual basis to make a scientifically informed decision, which the GIC never rectified by taking a precautionary approach itself.

127. To the extent that it is difficult to extract the JRP’s likelihood determination from its significance determination, Gitga’at submits that it may have conflated the two, or is at least a failure of the JRP to provide transparent reasons.

Mitigation

128. Gitga’at proposed technically and economically feasible terms and conditions²¹⁵ that would begin to address the Project’s potential effects on the Gitga’at.²¹⁶ These recommendations were not incorporated as terms and conditions to the Orders, and the JRP Report does not provide any analysis of these proposals or reasons why they were rejected.²¹⁷

129. Instead, the JRP accepted hypothetical and therefore uncertain and contradicted evidence that imposing additional conditions beyond existing regulatory requirements would improve oil spill clean up to a “manageable” level. In addition, “[i]n evaluating environmental burdens, the Panel placed considerable weight on the likelihood of successful mitigation in the case of construction and routine operations”²¹⁸, referring to Chapter 8 for details. However, the conditions described in Chapter 8 and the list of conditions do not explain how the effects of routine tanker traffic on Gitga’at will be mitigated. The JRP either erred by making that conclusion without stating why it did not accept Gitga’at’s uncontradicted evidence to the contrary, or else it erred by not considering such impacts at all. The JRP thus conflated “better than standard procedure”

²¹⁴ JRP Report, Vol 1, pdf p 62 [CB, Vol 1, Tab 20, page 413]; JRP Report, Vol 2, pdf p 17, section 2.4.2, p 20 section 2.4.6 [CB, Vol 2, Tab 21, pages 449, 452].

²¹⁵ *CEAA, 2012*, s 19(1)(d).

²¹⁶ Eg Exhibit D71-35-2, Appendix A pp 81-106 [GCR Vol 1, Tab 5, pages 213-238].

²¹⁷ JRP Report, Vol 2, Appendix 1, pdf pp 371-405 [CB, Vol 2, Tab 21, pages 803-837]; Arnold Clifton Affidavit, para 102-106, Exhibit “R” [GCR Vol 2, Tab 24, pages 123-5, 235-7].

²¹⁸ JRP Report, Vol 2, pdf p 17 [CB, Vol 2, Tab 21, page 449].

with “manageable”, and Gitga’at submits there was no reasonable basis in fact for that conclusion.

130. For example, the JRP did not mention why it dismissed Gitga’at’s evidence that there are existing ongoing leaks of hydrocarbons into Gitga’at’s territories which have caused significant adverse impacts to their ability to harvest clams and which still have not been cleaned up by those responsible.²¹⁹ Instead of confronting this reality, the fact that the proposed tankers will carry toxic diluted bitumen and condensate, and the lack of proof that mitigation could be effective in the area, the JRP concluded that existing vessel traffic “demonstrates that there is a current compatibility for multiple uses in this area.”²²⁰

131. The JRP did not offer any reasons why Gitga’at’s proposed mitigation measures, including additional negotiation with the goal of reaching agreement prior to project approval might rise “to the point of undue hardship for the non-Aboriginal population”.²²¹

132. Insofar as the JRP recommended only conditions requiring consultation generically with First Nations to develop “protection plans”,²²² it erred in law by considering future unknown agreement about unknown effects “mitigation”, when the Supreme Court of Canada has made it clear that such future unknowns are not “mitigation”²²³ in situations where no further government approvals are required. In this case, there are no further permits required from the Crown in respect of the marine aspect of the Project.

133. None of the conditions recommended by the JRP adequately address Gitga’at’s core concerns with the Project, such as protection from, for example, emigration due to changes in the environment caused by the Project. The Panel was silent on whether the potential benefits of the Project outweigh the potential burdens to Gitga’at from routine operations that are not successfully mitigated as hoped.

134. When the JRP Report and conditions do mention cultural protection, it is not in the form of agreements and does not ensure avoidance or adequate compensation. Gitga’at

²¹⁹ Exhibit D71-7-2, p9 [GCR Vol 1, Tab 8, page 270]; Exhibit D71-35-2, para 90 [GCR Vol 1, Tab 5, pages 157-8].

²²⁰ See JRP Report, Vol 2, pdf p286, 289 [CB, Vol 2, Tab 21, page 718, 721].

²²¹ *Nunatsiavut v. Canada (Attorney General)*, 2015 FC 492 para 332.

²²² Eg JRP Report, Vol 2, pdf pp 371, 375, 380, conditions 18, 50 [CB, Vol 2, Tab 21, pages 803, 807, 812].

²²³ “[V]ague hopes for future technology” or “the possibilities of future research and development” do not constitute proper mitigation measures *Pembina*, *supra* note 203, at paras 25-26, 69.

adopts the submissions of Gitxaatla regarding the fact that delegation of these issues to further consultation was unlawful. Although the conditions require NGP to report on its consultations to the NEB, they provide no role for Gitga'at in decision making or specify what impact the further consultations will have on project approval.

135. Furthermore, not specifying which conditions would mitigate which effects does not allow a reviewing court to properly assess the reasonableness of the JRP's conclusions and in that regard the JRP failed to meet its duty to provide reasons.

Public Interest Determination

136. Gitga'at told the JRP its definition and conception of socio-economic wellbeing differs significantly from NGP's view, and financial capital gains from the Project in the form of jobs, new businesses, and investment are insufficient incentives for the Gitga'at. As an example of the Gitga'at perspective, 90% of Gitga'at people surveyed stated that they do not look forward to economic benefits from the Project.²²⁴

137. Nevertheless, the JRP found that "employment, education, and training initiatives"²²⁵ would benefit "Aboriginal communities", despite the fact that any benefit is hypothetical in light of its acknowledgement that "the participation of local people and businesses in the project would be a vital component and that some benefits would only be realized to the extent that Aboriginal groups and other affected parties chose to pursue these opportunities."²²⁶

138. The JRP "acknowledged that the potential opportunities and benefits would not be distributed evenly."²²⁷ However, the JRP did not justify this uneven distribution of benefits. It was unreasonable for the JRP to accept an uneven distribution of benefits in the context of Gitga'at's constitutional rights and the potential for the Project to substantially deprive future generations of Gitga'at of the benefit of the land.

139. The JRP stated "We also were not persuaded that the project would adversely affect the health and wellbeing of people and communities along the route or in coastal areas. We found that the net overall economic effects of the project would be positive and would provide potential benefits and opportunities to those individuals and businesses that choose to participate in the project."²²⁸ The JRP did not state any reason

²²⁴ Exhibit D71-7-2, pdf pp4, 45 [GCR Vol 1, Tab 8, pages 249, 290].

²²⁵ JRP Report, Vol 2, pdf p 10, 2.4.1 [CB, Vol 2, Tab 21, page 442].

²²⁶ JRP Report, Vol 1, pdf p 38 [CB, Vol 1, Tab 20, page 389].

²²⁷ *Ibid.*

²²⁸ JRP Report, Vol 1, p 21, pdf p 26 [CB, Vol 1, Tab 20, page 377].

for discrediting Gitga'at's uncontradicted evidence to the contrary, nor why the benefits to those who choose to participate in the project outweigh Gitga'at's interests.²²⁹

140. The potential economic benefits of the Project do not, as a matter of constitutional principle, outweigh the potential significant adverse cultural and socio-economic effects on Gitga'at. This type of logic would justify deep and irreversible cultural harm to a local population in the name of the greater economic good, so long as harm is only "unlikely". Canadian constitutional law and its protection of minority rights, dignity and Aboriginal rights do not allow such trade-offs, and certainly do not allow them to be disguised as a technical report protected by "discretion".

141. The JRP summarized its understanding of environmental burdens in five short paragraphs and concluded that these adverse environmental outcomes were outweighed by the potential societal and economic benefits. Without a rationale for why the expected benefits justify the risks (in other words, without explaining why it decided that an environmental effect must be certain and/or permanently widespread in order to outweigh economic benefits that themselves are subject to some uncertainty), the JRP's ruling that the Project would be in the public interest was unreasonable.

142. For these reasons, Gitga'at submits that the JRP Report fails to disclose that the JRP considered all of the effects it was required to under section 5(1)(c) of *CEAA, 2012* in a reasonable way that met its obligations under section 35 of the *Constitution Act, 1982* and its promise of rights recognition. Even if this Court disagrees that the JRP erred in law by failing to correctly or reasonably fulfill its obligations, then these are errors of the GIC to the extent that the GIC merely adopted the JRP's analysis without providing a logical rationale for failing to reasonably accommodate Gitga'at's rights and title.

PART IV – ORDERS SOUGHT

143. Gitga'at seeks the orders set out in its Notice of Application,²³⁰ including (1) a declaration that the GIC's Order unjustifiably infringed Gitga'at title, (2) a declaration that Canada breached its duty to consult Gitga'at and accommodate its title and rights claims, (3) a declaration that the JRP acted inconsistently with section 35 of the *Constitution Act, 1982*, (4) orders that the JRP Report and the GIC Order be set aside, and (5) costs.

²²⁹ Exhibit D71-7-2, pdf pp 3-10 [**GCR Vol 1, Tab 8, pages 248-55**]; Exhibit D71-7-7, pdf p6-9 [**GCR Vol 1, Tab 11, pages 421-424**]; Exhibit D71-7-3, pdf p 6-7 [**GCR Vol 1, Tab 21, pages 794-5**].

²³⁰ *Gitga'at First Nation v Canada et al.*, Notice of Application A-67-14 [**CB, Vol 1, Tab 6, pages 84-85**]; *Gitga'at First Nation v Canada et al.*, Notice of Application A-445-14 [**CB, Vol 1, Tab 10, pages 178-180**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver this 22nd day of May 2015

Michael Lee Ross

Grace A. Jackson

Counsel for the Applicant Gitga'at First Nation

PART V – LIST OF AUTHORITIES

Appendix A – Statutes or Regulations

Citation	Provisions Cited
<i>Canadian Environmental Assessment Act, 2012</i> , SC 2012, c 19	ss 5, 19(1)(d), 43(1)
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11	s 35

Appendix B – Authorities

Citation
<i>Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)</i> , [2001] 2 FCR 461, 2001 CanLII 22029 (FCA)
<i>Citadel General Assurance Co v Lloyds Bank Canada</i> , [1997] 3 SCR 805, 1997 CanLII 334
<i>Conseil des innus de Ekuanitshit c Canada (Procureur général)</i> , 2013 FC 418
<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010, 1997 CanLII
<i>Dunsmuir v. New Brunswick</i> , [2008] 1 SCR 190, 2008 SCC 9
<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , [1992] 1 SCR 3, 1992 CanLII 110
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